TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 243.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

vs.

PACIFIC EXPRESS COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED SEPTEMBER 19, 1914.

(24,370)

(24,370)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 249.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

vs.

PACIFIC EXPRESS COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1915.

1 In the Supreme Court of Missouri, Court in Banc, July 14th, 1914.

ABRAM ROSENBERGER, Respondent (Plaintiff in Error),
vs.
PACIFIC EXPRESS COMPANY, Appellant (Defendant in Error).

Now at this day, there is presented to the Honorable Henry Lamm, Chief Justice of the Supreme Court of the State of Missouri, in Chambers, a petition for a writ of error, to the Supreme Court of the United States, a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, an assignment of errors, a bond, to operate as a supersedeas, in the sum of Two Hundred Dollars, and citation directed to the said Appellant (Defendant in Error), citing and admonishing it to be and appear at the Supreme Court of the United States within thirty days from the date thereof; which said writ of error is allowed, said citation signed, said assignment of errors filed, and said bond, to operate as a supersedeas, approved, ordered filed and made part of the record herein.

2 The Supreme Court of the State of Missouri.

No. 16502.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court of Missouri in rendering judgment against him in the above entitled suit, the respondent, Abram Rosenberger, prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond. An assignment of errors and prayer for a reversal of the judgment of the Supreme Court of Missouri are hereto attached and made a part hereof.

FRANK F. ROZZELLE,
J. J. VINEYARD,
A. F. SMITH,
Attorneys for Petitioner, Abram Rosenberger.

3 The writ of error as prayed for in the foregoing petition is hereby allowed this 14 day of July, A. D. 1914, the writ of

error to operate as a supersedeas and the bond for that purpose is fixed at the sum of Two Hundred ($200.) Dollars.

Dated at Jefferson City, Missouri, this 14 day of July, A. D. 1914.

HENRY LAMM,
Chief Justice Supreme Court of the State of Missouri.

Filed in my office this 14th day of July, A. D. 1914.
J. D. ALLEN,
Clerk Supreme Court of the State of Missouri.

3½ Endorsed: In the Supreme Court of the State of Missouri. No. 16502. Abram Rosenberger, respondent, vs. Pacific Express Company, appellant. Petition for writ of error. Filed Jul-14, 1914. J. D. Allen, clerk.

4 The Supreme Court of the State of Missouri.

No. 16502.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes Abram Rosenberger, the above named respondent herein, and represents that on to-wit: May 15th, 1909, he recovered a judgment in the above entitled suit for Eight Hundred One and Thirty Hundredths ($801.30) Dollars against Pacific Express Company appellant, in the Circuit Court of Jackson County, Missouri; that in said suit on to-wit: May 20th, 1914, the Supreme Court of Missouri, being the highest court in said state in which a decision in the suit could be had, after a consideration of said suit on its merits, rendered judgment reversing said judgment of said Circuit Court without remanding said suit, which judgment of said Supreme Court of Missouri, under the laws of Missouri, (Strottman v. St. Louis etc. Co., 228 Mo. 154), was a final decision of said suit in favor of said appellant, Pacific Express Company, and against the plaintiff, Abram Rosenberger, on the merits.

Said respondent, Abram Rosenberger, files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

4½ The Supreme Court of Missouri erred in holding and deciding that the law passed by the Legislature of the State of Texas and approved February 12th, 1907, and found in the general laws of the State of Texas passed by the state legislature of Texas at its session convened January 3rd, 1907, and adjourned April 12th, 1907, and entitled "Taxes—imposing occupation tax on persons,

firms or corporations handling liquors C. O. D." (H. B. 53, Ch. IV), was valid and affected interstate shipments C. O. D. from the State of Missouri to the State of Texas.

The validity of said section was denied and drawn in question by the respondent, Abram Rosenberger, on the ground of its being repugnant to and in contravention of section 8, and section 10, of Article I, of the Constitution of the United States.

Said errors are more particularly set forth as follows:

The Supreme Court of Missouri erred in holding and deciding:

1. That said statute of Texas of February 12, 1907, was a valid enactment of the legislature of said state, insofar as it affected, applied to or controlled interstate C. O. D. shipments of original packages of liquor shipped from the State of Missouri to the State of Texas, and was not repugnant to or in contravention of either section 8 or section 10 of Article I of the Constitution of the United States.

2. That said act of the State of Texas of February 12, 1907, was a valid police regulation of the State of Texas and was not repugnant to or in contravention of either section 8 or section 10 of Article I of the Constitution of the United States and was, therefore, a legal excuse for the refusal of respondent, Pacific Express Company, to comply with its obligations and undertakings to and with respondent, Abram Rosenberger, to carry from Missouri and deliver in Texas original packages of liquor and collect the cost price thereof on delivery, the said appellant, Pacific Express Company, having received such packages from respondent, Abram Rosenberger, in Missouri and having agreed in Missouri to carry them from the state of Missouri to the state of Texas and to deliver the same, in Texas, to the consignees thereof (who had purchased the same in Missouri) on the payment of the purchase price thereof by such consignees; such obligations and undertakings having been assumed by appellant, Pacific Express Company, prior to the passage of such Texas statute.

3. That the trial court properly admitted in evidence the said statute of the state of Texas of February 12th, 1907, and did not err in overruling the objection of respondent that said statute was in contravention of section 8 of Article I of the Constitution of the United States.

4. In not holding that said statute of Texas of February 12, 1907, is an unwarranted attempt to regulate interstate commerce and is violative of section 8 of Article I of the Constitution of the United States.

5. In reversing the judgment in favor of respondent, whereby the erroneous rulings aforesaid were made.

For which errors the respondent, Abram Rosenberger, prays that the said judgment of the Supreme Court of the State of Missouri, of to-wit: May 20, 1914, be reversed and that a judgment be rendered in favor of respondent, Abram Rosenberger, and for costs.

FRANK F. ROZZELLE,
J. J. VINEYARD,
A. F. SMITH,
Attorneys for Abram Rosenberger.

5½ [Endorsed:] In the Supreme Court of the State of Missouri. No. 16,502. Abram Rosenberger, respondent, vs. Pacific Express Company, appellant. Assignment of errors and prayer for reversal. Filed July 14, 1914. J. D. Allen, clerk.

6 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the Supreme Court of the State of Missouri before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Abram Rosenberger and Pacific Express Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, a state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Abram Rosenberger, as by his complaint, appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington on the 13th day of August,

7 1914, in the said supreme court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 14th day of July, in the year of our Lord, One Thousand Nine Hundred and Fourteen.

[Seal of the United States District Court, Central Division, Western District of Missouri.]

JOHN B. WARNER,
Clerk of the District Court of the United States for the Central Division of the Western District of Missouri.
By H. C. GEISBERG,
Deputy Clerk.

Allowed July 14, 1914.

HENRY LAMM,
Chief Justice Supreme Court of Missouri.

7½ [Endorsed:] In the Supreme Court of the State of Missouri. No. 16,502. Abram Rosenberger, respondent, vs. Pacific Express Company, appellant. Writ of error. Filed Jul- 14, 1914. J. D. Allen, clerk.

8 In the Supreme Court of the State of Missouri.

No. 16502.

ABRAM ROSENBERGER, Plaintiff in Error,
vs.
PACIFIC EXPRESS COMPANY, Defendant in Error.

Bond.

Know all men by these presents, That we, Abram Rosenberger, as principal, and Royal Indemnity Company (a corporation duly qualified to act as surety on bonds in the State of Missouri), as surety, are held and firmly bound unto Pacific Express Company, in the sum of Two Hundred ($200.) Dollars, to be paid to the said Pacific Express Company, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 13th day of July, 1914.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Missouri.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

ABRAM ROSENBERGER, *Principal.*
ROYAL INDEMNITY COMPANY,
By R. L. STEWART, *Att'y in Fact,*
Surety.

Attest:

——— ———.

Bond approved, and to operate as a supersedeas.
Dated July 14, 1914.

HENRY LAMM,
Chief Justice Supreme Court of Missouri.

O. K.
I. N. WATSON.

9 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Pacific Express Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Missouri, wherein Abram Rosenberger is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Justice of the Supreme Court of the State of Missouri, this 14 day of July, 1914.

HENRY LAMM,
Chief Justice Supreme Court of Missouri.

Attest:
J. D. ALLEN,
Clerk Supreme Court of Missouri.

Kansas City, Mo., July 14th, 1914.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

I. N. WATSON,
Attorney for Pacific Express Company.

9½ [Endorsed:] In the Supreme Court of the State of Missouri. No. 16,502. Abram Rosenberger, respondent, vs. Pacific Express Company, appellant. Citation. Filed Jul- 14, 1914. J. D. Allen, clerk. Rozzelle, Vineyard and Thacher, attorneys at law.

10 In the Supreme Court of the United States.

ABRAM ROSENBERGER, Plaintiff in Error,
vs.
PACIFIC EXPRESS COMPANY, Defendant in Error.

Order of Enlargement of Time for Docketing this Case and Filing the Record Thereof.

For good cause shown, the time for docketing the above entitled case and filing the record thereof with the Clerk of the Supreme Court of the United States is hereby extended to Thursday, the first day of October, 1914.

HENRY LAMM,
Chief Justice of the Supreme Court of Missouri.

10½ [Endorsed:] #16,502. In the Supreme Court of the United States. Abram Rosenberger, plaintiff in error, vs.

Pacific Express Company, defendant in error. Order of enlargement of the time for docketing this case and filing the record thereof. Filed Aug. 4, 1914. J. D. Allen, clerk. Rozzelle, Vineyard and Thacher, attorneys at law.

11 Be it remembered, that on the 63 day of the regular March Term, 1909, of the Circuit Court of Jackson County, Missouri, at Independence, the same being the 15 day of May, A. D. 1909, the following proceedings were had and made of record before the Honorable Walter A. Powell, Judge of the Independence Division, in words and figures as follows, to-wit:

17855.

ABRAM ROSENBERGER, Plaintiff,
vs.
THE PACIFIC EXPRESS COMPANY, a Corporation, Defendant.

Now on this day comes plaintiff, in person and by attorney, and defendant appears by its attorney. This cause now coming on for trial a jury having heretofore — waived, is submitted to the Court upon the pleadings, and after hearing the evidence, and the arguments of counsel for the respective parties, and being fully advised in the premises, the Court finds the issues for the plaintiff and assesses his damages at the sum of $801.30. It is therefore ordered and adjudged by the court that the plaintiff have and recover of and from the defendant the said sum of Eight Hundred and One Dollars and thirty cents, ($801.30) with interest thereon from and after this date at the rate of six per cent per annum until paid, together with all costs herein and have hereof execution.

Be it remembered, that on the 26th day of the regular June Term, 1909, of the Circuit Court of Jackson County, Missouri, at Independence, the same being the 7th day of July, A. D. 1909, the following proceedings were had and made of record before the Honorable Walter A. Powell, Judge of the Independence Division, in words and figures as follows, to-wit:

17855.

ABRAM ROSENBERGER, Plaintiff,
vs.
PACIFIC EXPRESS COMPANY, Defendant.

Defendant files application and affidavit for appeal to the Supreme Court of this State. The Court refuses to grant appeal to the
12 Supreme Court, but grants appeal to the Kansas City Court of Appeals. Defendant is given until on or before December 1st, 1909, in which to file its bill of exceptions.

Defendant files bond in the sum of $2,000.00 with H. W. Walker and Eli Lewis as sureties. Bond approved.

STATE OF MISSOURI,
County of Jackson:

I, Oscar Hochland, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the order allowing appeal in the case entitled Abram Rosenberger, Plaintiff against Pacific Express Company, Defendant, as the same now appears in my office.

In witness whereof, I hereunto set my hand and affix the seal of said Circuit Court at office in Independence, this 10th day of July, A. D. 1909.

[SEAL.]

OSCAR HOCHLAND, *Clerk*,
By E. C. HAMILTON, *Deputy*.

13 In the Kansas City Court of Appeals, October Term, 1910, October 12th, 1910.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Appeal from Jackson Circuit Court.

Now at this day the Court having fully considered Appellant's motion to transfer the said cause to the Supreme Court of Missouri, doth consider and adjudge that said motion be and the same is hereby sustained, because in said cause is involved a construction of the Constitution of the United States in that a statute of the State of Texas is claimed to be constitutional and valid by Appellant and the same statute is claimed to be unconstitutional and void and in violation of the Constitution of the United States by Respondent. It is therefore ordered that said cause be certified to the Supreme Court for the above reasons, for its determination.

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals, do hereby certify that the foregoing is a full, true and complete order of the Court transferring the above styled cause to the Supreme Court, as fully as the same appears of record.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, done at office in Kansas City, Missouri, this 24th day of October, A. D. 1910.

[SEAL.]

L. F. McCOY, *Clerk*,
By C. V. GARNETT, *D. C.*

14 ABRAM ROSENBERGER, Respondent (Plaintiff in Error),
vs.
PACIFIC EXPRESS COMPANY, Appellant (Defendant in Error).

This case and the case of Abram Rosenberger v. Wells Fargo and Company involve the same questions, were tried together by agreement of parties in the Circuit Court of Jackson County, Missouri, and by agreement of parties were argued together in the Supreme

Court of Missouri and were decided together by that court. Since the decisions of the cases in the Supreme Court of Missouri, the parties in the case of Abram Rosenberger v. Wells Fargo and Company have stipulated and agreed that the judgment in said case shall abide the decision in the above entitled case.

15 In the Kansas City Court of Appeals, October Term, 1910.

No. 9242.

ABRAM ROSENBERGER, Respondent,
vs.
WELLS FARGO & COMPANY, Appellant.

No. 9243.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Appellants' Joint Abstract of the Record.

These causes were begun in the Circuit Court of Jackson County, Missouri, at Independence, on the first day of April, 1907, by the filing of plaintiff's petitions, which are in words and figures as follows, omitting caption and signatures, to-wit:

16 *Petition in Pacific Express Company Case.*

Plaintiff states that he is now, and at all times herein mentioned, has been doing business under the trade name of the Penwood Company; that defendant is and was at all times herein mentioned, a corporation and liable to be *used* as such in the courts of this state; that defendant is and was at all said times an express company and is and was at all said times a common carrier of goods for hire between Kansas City, Missouri, and various points in the State of Texas; that at sundry times between the 12th day of January, 1907, and the 12th day of February, 1907, plaintiff, at said Kansas City, delivered to defendant and defendant received certain goods, to-wit: Certain packages containing intoxicating liquors, which said packages defendant agreed for and in consideration of certain charges paid to it by plaintiff well and safely to carry from said Kansas City to certain points in the State of Texas designated on said packages respectively, and at the destination thereof to deliver the same to the respective consignees thereof. Said goods are described in the following list which shows the particulars of each shipment, to-wit: The date upon which each of said packages was delivered to said defendant, and the name of each consignee the destination of each of said packages, said destination being in each instance in the

State of Texas, the quantity of liquors in each package, and the amount of the express charges paid by plaintiff to defendant on each of said packages, said list being as follows:

(Here follows a long list of separate shipments, all to points in Texas, as to the correctness and value of which there is no controversy.)

That on or about the 12th day of February, 1907, while the said goods, which were then of the value of $829.30, were the property of plaintiff and while plaintiff had the right to the possession of the same, defendant then being in possession of said goods, wilfully, wantonly and wrongfully converted the said goods to its own use and disposed of the same, to plaintiff's damage in the sum of Eight Hundred Twenty-nine and 30/100 Dollars ($829.30).

Wherefore, plaintiff prays actual damages from defendant in the sum of Eight Hundred Twenty-nine and 30/100 Dollars ($829.30), together with interest thereon at the rate of six per cent. per annum, from April 1st, 1907, the date of filing this petition, and punitive damages in the sum of Eight Hundred Twenty-nine and 30/100 Dollars ($829.00), together with his costs in this behalf expended.

17 The defendant, Pacific Express Company, on the 24th day of March, 1909, filed its amended answer to plaintiff's petition, which, omitting caption and signatures, is as follows, to-wit:

Amended Answer.

Comes now defendant in the above entitled cause and for its amended answer to plaintiff's petition, states:

I.

Defendant denies each and every allegation in said petition contained.

Wherefore, having fully answered, defendant prays to be discharged with its costs.

II.

Further answering, defendant states that at the times mentioned in plaintiff's petition, defendant received from plaintiff certain shipments of liquor to be carried and delivered C. O. D. to certain consignees in the State of Texas; that by the terms, C. O. D., is meant that defendant was to collect from said consignees the purchase price of said consignments of liquors, together with the express charges thereon, which had been previously paid by the plaintiff, and return said purchase price and express charges to the plaintiff, that defendant is not now able to state whether said consignments and the amounts thereof are correctly stated in plaintiff's petition or not, but defendant states that delivery of each and every consignment mentioned in plaintiff's petition, which was actually entrusted to defendant for shipment, was prevented by course of law

enacted on February 12th, '07, by the Legislature of Texas, and it was thereby rendered unable to make lawful delivery of said consignments of liquor to the consignees; only on collection of said C. O. D. charges, that after defendant was so prevented from making deliveries of said liquors, it promptly brought the same back to Kansas City, where the consignments were originally received from the plaintiff and tendered the same to plaintiff, but plaintiff refused to receive or accept the same and that defendant has been obliged by reason there to keep said liquors in its possession and it now hereby tenders all of said liquors which have not, by reason of their own inherent defects, been destroyed, to the plaintiff.

Wherefore, having fully answered, defendant prays to be discharged with its costs.

Plaintiff's reply to defendant, Pacific Express Company's answer, was in the nature of a general denial.

18 *Record Entries.*

These causes were tried at the March Term, 1909, in the Circuit Court of Jackson County, Missouri, at Independence, before the Honorable Walter A. Powell, Judge, a jury having been waived in each of the cases by stipulation of the parties. The trial of the Pacific Express Company case began on the 24th day of March, 1909, and during the trial of said cause, the following stipulation was entered into by and between the parties, to-wit:

"For the purpose of expediting the trial of above causes and to obviate the necessity of making two records, it is hereby stipulated that the above entitled suits may be consolidated and tried together as one action, but separate judgments shall be entered in favor of or against each defendant and any evidence introduced by any party and applicable solely to one defendant shall not be considered for or against the other defendant."

This stipulation was executed by plaintiff and by each of the defendants in each of said causes and was filed in each of said causes and record entry duly made of the filing of said stipulation in each cause on the 26th day of March, 1909. The trial of the Pacific Express Company case was completed on the 26th day of March, and was taken under advisement by the court, and the court proceeded with the trial of the Wells Fargo Express Company case on said 26th day of March.

The trial of said Wells Fargo & Company case being finished, the court took the same under advisement and thereafter, and to-wit, on May 15th, 1909, and during said March term, 1909, the court, after hearing the evidence and the arguments of counsel for the respective parties, and being fully advised in the premises, found the issues for the plaintiff and against the defendant Pacific Express Company, and rendered judgment for plaintiff in said cause for the sum of Eight Hundred One Dollars and Thirty Cents ($801.30), and record entry duly made of such judgment, in said cause, and at the same time the court rendered judgment in favor

of the plaintiff and against the defendant, Wells Fargo &
19 Company, for the sum of One Thousand Five Hundred Seventeen Dollars and Forty-five Cents ($1,517.45), and record entry duly made of such judgment in said cause.

On May 19, 1909, and during said March Term, 1909, and within four days after judgment, the defendant in each of said causes filed its motion for a new trial and record entry was duly made of said filing of said motions in each of said causes.

On June 23, 1909, and at the next term of said court, being the June, 1909, Term of said Court, defendants' motions for new trial in each of said causes were overruled, to which action of the court in overruling said motions, the defendants in each of said causes excepted at the time and judgment was rendered in favor of the plaintiff and against the defendant in the Pacific Express Company case in the sum of Eight Hundred One Dollars and Thirty Cents ($801.30), and costs, and in the Wells Fargo & Company case in the sum of One Thousand Five Hundred Seventeen Dollars and Forty-five Cents ($1,517.45), and costs, and record entries were duly made of such orders in each of said causes.

On July 27, 1909, and during said June Term, 1909, of said court, the defendant, Pacific Express Company, filed its application and affidavit for appeal to the Supreme Court of the State of Missouri, and at the same time and on said date the defendant, Wells Fargo & Company, filed its application and affidavit for appeal to the Supreme Court of the State of Missouri, the court refusing to grant an appeal to the Supreme Court, but granted the appeal in each case to the Kansas City Court of Appeals. To the action of the court in refusing to allow the appeal of said causes to the Supreme Court defendants in each of said causes excepted at the time and record entry duly made of such exceptions at the time.

20 The court on the same day granted and allowed defendant, Pacific Express Company, until on or before December 1, 1909, in which to file its bill of exceptions, and the court on the same day granted and allowed defendants, Wells Fargo & Company, until on or before December 1, 1909, within which to prepare and file its bill of exceptions.

On the same day the defendant, Pacific Express Company, filed its appeal bond in the sum of Two Thousand Dollars ($2,000.00), which was approved by the court and filed.

The court at the same time and on the same day in the Wells Fargo & Company case fixed the amount of the appeal bond in the sum of Three Thousand Five Hundred Dollars ($3,500.00), and record entries were duly made of such orders, and filings in each of said causes.

Thereafter, within the time allowed, defendant, Wells Fargo & Company, filed its appeal bond, which was approved by the court.

At the next term of the court, being the September Term, 1909, and on the 29th day of November, 1909, and within the time allowed by the court within which to prepare and file their bill of exceptions, the defendant in each of said causes filed its application

to have the time for filing its bill of exceptions extended and on said 29th day of November, 1909, by order entered of record in pursuance of stipulation of parties, and for other good cause shown, the court extended the time for filing defendant's bill of exceptions until on or before the 12th day of March, 1910, and record entry was duly made of such order in each of said causes.

On March 9th, 1910, and during the December Term, 1909, of said court, and within the time allowed by the court within
21 which to prepare and file their bill of exceptions, the defendant in each of said causes filed its application to have the time for filing its bill of exceptions extended and on said 9th day of March, 1910, by order entered of record in pursuance of stipulation of parties and for other good cause shown, the court extended the time for filing defendant's bill of exceptions until on or before June 4, 1910, and record entry was duly made of said order in each of said causes at said time.

On May 23rd, 1910, and during the March Term, 1910, of said court, and within the time allowed by the court within which to prepare and file their bill of exceptions, the defendant in each of said causes filed its application to have the time for filing its bill of exceptions extended and on said 23rd day of May, 1910, by order entered of record in pursuance of stipulation of parties and for other good cause shown, the court extended the time for filing its bill of exceptions until on or before the first day of July, 1910, and record entry was duly made of such order in each of said causes at said time.

On June 27th, 1910, and during the June Term, 1910, of said court, and within the time allowed by the court within which to prepare and file their bill of exceptions, the defendant in each of said causes filed its application to have the time for filing its bill of exceptions extended and on said 27th day of June, 1910, by order entered of record, in pursuance of stipulation of parties, and for other good cause shown, the court extended the time until on or before September 10, 1910.

On September 9, 1910, and within the time allowed by the court within which to prepare and file their bills of exceptions, the defendant and each of them presented to the court their bills
22 of exceptions, which said bills of exceptions were by the Honorable Walter A. Powell, Judge of the Circuit Court, wherein said causes were pending, and said proceedings were had, and before whom said causes were tried, examined, approved, signed and sealed and ordered to be filed and made a part of the record in said causes, which was accordingly done on the 9th day of September, 1910, and record entry of said proceedings duly made in each of said causes at said time. Said bills of exceptions are in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Independence, March Term, 1909.

No. 17855.

A. ROSENBERGER, Plaintiff,
vs.
PACIFIC EXPRESS COMPANY, Defendant.

Be it remembered, That on Wednesday, the 24th day of March, 1909, and at said March Term of said Circuit Court, the above entitled cause coming on to be heard before the court, Honorable Walter A. Powell, Judge, presiding, and a jury having been waived by stipulation, plaintiff appearing by Rosenberger, Taylor & Reed, his attorneys, and defendant appearing by Douglass & Watson, its attorneys, the following proceedings were had:

Plaintiff, to sustain the issues upon his part, offered evidence as follows:

Mr. Watson: The statement in there that charges were prepaid means only charges for going, not the return charges.

Mr. Rosenberger: Let the record show, to avoid any question as to the proper means of getting the stipulation in the record, that the stipulation just read is offered in evidence, stipulation between counsel dated February 13th, 1908.

Said paper was here marked by the stenographer Exhibit
23 "I," and is in words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Independence, December Term, 1907.

No. 17855.

A. ROSENBERGER, Plaintiff,
vs.
PACIFIC EXPRESS COMPANY, Defendant.

Stipulation.

For the purposes of the trial of this cause, it is stipulated as follows:

That from time to time during the period commencing January 12th, 1907, and ending February 11th, 1907, both inclusive, the plaintiff, at Kansas City, Missouri, delivered to the defendant express company for shipment C. O. D., and defendant received at Kansas City, Missouri, for shipment, C. O. D., to certain points in the State of Texas, certain packages containing intoxicating liquors; that the express charges on each package were in each instance prepaid by the plaintiff; that the date of each shipment, the names of the consignees, the destination of each shipment, the

quantity of liquor in each package, the price of each consignment to be collected by the defendant on the delivery thereof from the respective consignees, and the amount of the express charges prepaid on each shipment are correctly set forth in plaintiff's petition. No contention is made by the defendant that any of said shipments were made by plaintiff otherwise than pursuant to and in accordance with bona fide orders received and accepted at Kansas City, Missouri, by plaintiff from the respective consignees, residents of the towns to which said packages were consigned respectively as aforesaid. Each of said packages was forwarded by defendant to its destination in the State of Texas, and arrived there in the usual course of transportation without undue delay.

It was the usual and regular course of business of defendant at all times herein mentioned to send written notices properly
24 stamped and addressed, to all consignees of arrival of express matter consigned to them. This course of business was carried out with respect to the shipments mentioned in plaintiff's petition.

Until February 12th, 1907, the defendant, through its local agents in Texas at point of destination stood ready and was willing to deliver to all such consignees of intoxicating liquor who might call at the destination office of defendant and pay or tender the proper charges thereon all such liquor which had been shipped to them C. O. D., but after said date, to-wit, February 12th, 1907, defendant refused to deliver C. O. D. anywhere in the State of Texas intoxicating liquors shipped C. O. D. to any person under any conditions or circumstances whatsoever, and on said February 12th, 1907, defendant wholly ceased to deliver to any one in the State of Texas, any such liquor shipped C. O. D. whether the consignee thereof paid or tendered the proper charges on such shipment or otherwise.

On said date, to-wit, February 12th, 1907, all of the local agents of defendant in Texas received from defendant instructions by telegraph to thereafter withhold and refuse delivery to the consignees thereof of all packages of intoxicating liquors shipped C. O. D. and on hand at their respective offices or in transit thereto, including the packages described in plaintiff's petition, and said instructions were obeyed by said agents of defendant. Said instructions to cease and discontinue the delivery of liquor shipped C. O. D., so given to defendant's local agents in Texas, were promulgated by defendant on February 12th, 1907, as a standing rule and regulation, effective immediately, and were made known to the public at large, including the persons to whom the packages mentioned in the petition had been consigned, and if after said date any of the consignees of said liquor, mentioned in plaintiff's petition, had called at the proper office of defendant and had tendered the defendant the proper C. O. D. charges on the liquor shipped to him, and had offered to accept the same, delivery thereof C. O. D. would have been refused by defendant.

25 At the time defendant ceased and discontinued the delivery of liquor shipped C. O. D. in the State of Texas, on February 12th, 1907, as aforesaid, all of the packages of liquor de-

scribed in plaintiff's petition were either on hand at defendant's destination office, in Texas, or were in transit thereto.

Either party to this cause shall have the right to object at the trial to the competency, materiality or relevancy of any of the matters hereinabove set forth, and shall have the right to introduce other and additional evidence not inconsistent with the foregoing statement.

J. C. ROSENBERGER,
Attorney for Plaintiff.
I. N. WATSON,
Attorney for Defendant."

Dated, February 13th, 1908.

On the trial of case No. 17855, Abram Rosenberger v. Pacific Express Company and case No. 17856, Abram Rosenberger v. Wells Fargo & Company, in the Circuit Court of Jackson County, Missouri, at Independence, on, to-wit, March 24, 1909, and the days immediately following, the parties entered into the following stipulation:

"For the purpose of expediting the trial of the above cause and to obviate the necessity of making two records, it is hereby stipulated that the above entitled suits may be consolidated and tried together as one action, but separate judgments shall be entered in favor of or against each defendant and any evidence introduced by any party and applicable solely to one defendant shall not be considered for or against the other defendant."

This stipulation was executed by the plaintiff and by each of the defendants in each of said actions.

26 ABRAM ROSENBERGER, plaintiff, called as a witness in his own behalf, having been duly sworn, testified as follows:

Direct examination by Mr. Rosenberger:

Q. State your name, please?
A. Abram Rosenberger.
Q. Where do you reside?
A. Kansas City, Missouri.
Q. What business are you engaged in?
A. I am in the liquor business. I am a distiller and a liquor dealer.
Q. Have you a distillery?
A. Yes, sir.
Q. Where is your place of business?
A. My distillery is at Liberty, Missouri; my place of business is at Kansas City, Missouri.
Q. How long have you been in business in Kansas City?
A. Eleven years.
Q. I call your attention to the list of liquor shipments set out in the petition in this case, and referred to in the stipulation offered as Exhibit No. 1, and will ask you to state whether or not these shipments were made by you pursuant to written orders received from the persons to whom these liquors were sent.

A. The shipments were all made pursuant to orders received in the mail from the persons to whom the liquors were sent.

Q. Where were these orders received by you?

A. At my place of business in Kansas City, Missouri.

Q. Where did you accept the orders?

A. In Kansas City, Missouri.

27 Q. You may state whether the orders for these liquors from the respective purchasers of the same called for the amount of liquor which was sent in these shipments that are mentioned in your petition.

A. The shipments were made exactly in accordance with the request for shipment made by the parties who ordered the same, yes.

Q. Now, it is admitted in this case by the agreed statement of facts or stipulation Exhibit No. 1 that all of the packages of liquor that are mentioned in the petition were received by the defendant express company, and that the express charges for carrying the liquors down to Texas were paid by you on each shipment, as set out in your petition. When you delivered these liquors to the defendant express company, did the express company give you any receipt for the liquors?

A. Yes, the express company's receipt. The express company receipted for the shipments.

Mr. Rosenberger: Mr. Watson, we have here in the court room all of the original receipts that the express company delivered to Mr. Rosenberger covering these shipments in question. You don't want to encumber the record with all those originals?

Mr. Watson: I have not looked them over, but if the witness says they are all made to those firms, I am not asking that the record be encumbered.

Q. Is the paper which I hand you the form of the receipt which was, in each instance, signed by the defendant express company, at the time you delivered the liquors to the defendant for shipment to Texas?

A. This was the form employed at all times in those shipments.

Q. And were those receipts signed by the express company?

A. Signed by the express company, or their agent, the man who received the goods from our place, the man who was in the employ of the express company.

Q. Where were those receipts delivered to you?

A. At my place of business.

Q. Your store?

A. Yes, sir.

Q. The Pennwood Company was the name under which you were transacting your business, was it not?

A. Yes.

Q. It was not a corporation?

A. Not a corporation.

Q. It was a mere trade name?

A. It was a mere trade name.

Q. At the time that the receipts were delivered to you by the express company, covering the shipments that are here in question, had they furnished you with a form of their regular form of receipt?

A. Yes, we had some in our office.

Q. I will ask you to state whether this is the form with
28 which you had been provided by the defendant as their regular form of receipt.

A. Yes, this is the regular form of receipt that was provided me.

Mr. Rosenberger: It is handed to the stenographer for identification, and is offered in evidence.

Said paper was here marked by the stenographer Exhibit "17," and is in words and figures as follows, to-wit:

"Read the conditions of this receipt.

The Pacific Express Company.

KANSAS CITY, MO.,.....190–.

Not Negotiable.

Received of .....

.....said to contain.....

Value asked and.....given as.....Dollars,

(If value is not given, shipper agrees that the value thereof does not exceed Fifty Dollars).

Marked .....

.....

Which the Company undertakes to carry, but not beyond its own lines, subject to the following conditions, and which conditions are agreed to by the shipper or owner in accepting this receipt.

1. In consideration of the charges therefor, the said Pacific Express Company undertakes to carry the same to the point of destination above designated, if such destination be located on its own lines, but if such destination be located beyond the lines of the Pacific Express Company, then it agrees to deliver the same to its next connecting carrier to be forwarded under the rules and regulations of, and subject to the conditions prescribed by such connecting carrier, and in so delivering the same it is agreed that the Pacific Express Company shall act as the agent only of the shipper.

2. If the destination of this shipment is beyond the lines of the Pacific Express Company and the shipper has advanced the charges thereon to such destination, it is understood and agreed by the shipper or owner that the money so advanced to the Pacific Ex-
29 press Company in excess of its charges is accepted by it for the convenience and as the agent of the shipper, and which, as such agent, it agrees to turn over to the connecting carrier who may undertake to forward the property shipped to said destination in payment of the charges to such connecting carrier.

3. This company is not to be held liable for any loss or damage except as forwarders only, nor for any loss, damage or delay, by the

dangers of navigation, by the act of God, or of the enemies of Government, by the restraints of Government, mobs, riots, insurrections, pirates, or from or by reason of any of the hazards or dangers incident to a state of war.

4. Nor shall this Company be liable for any default or negligence of any person, corporation or association to whom the above described property shall or may be delivered by this Company, for the performance of any act or duty in respect thereto, and any such person, corporation or association, is not to be regarded, deemed or taken to be the agent of this Company for any such purpose, but, on the contrary, such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this Company received the property above described. It being understood that this Company relies upon the various Railroad and Steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any losses or damages caused by the detention of any train of cars or of any steamboat or other vehicle upon which said property shall be placed for transportation; nor by the neglect or refusal of any railroad company, steamboat or other transportation line to receive and forward the said property. Nor shall this Company be liable for any losses or damages caused by the detention of said property due to Customs Regulations.

5. It is further agreed this Company is not to be held liable or responsible for any loss of, or damage to, said property or any part thereof from any cause whatever, unless in every case the said loss or damage to be proved to have occurred from the fraud or gross negligence of said Company or its servants; nor in any event shall this Company be held liable or responsible, nor shall any claim be made upon it beyond the sum of Fifty dollars, unless the just and true value thereof is stated herein, and an extra charge is paid or agreed to be paid therefor, based upon such higher value; nor upon any property or thing unless properly packed and secured for transportation; nor upon any fragile fabric, or any fabrics consisting of, or contained in, glass.

6. If any sum of money beside the charges for transportation is to be collected from the consignee on delivery of the above described property and the same is not paid, or if in any case the consignee cannot be found or refuses to receive such property, or for any other reason it cannot be delivered, the shipper agrees that this Company may return said property to him subject to the conditions of this receipt and that he will pay all charges for transportation, and that the liability of this Company for such property while in its possession for the purpose of making such collection, shall be that of a Warehouseman only.

7. In no event shall this Company be liable for any loss, damage or delay, unless the claim therefor shall be presented to it in writing at this office within ninety days after the date of shipment, in a statement to which this receipt shall be annexed.

8. It is further agreed that this Company shall have the full bene-

fit of any insurance that may have been effected upon or on account of said property.

9. And it is further stipulated and agreed, in consideration of the rate of freight to be charged, that the Pacific Express Company shall not be required to make free delivery of the property above mentioned, to the consignee at any station where no voluntary free delivery service is maintained by said Company; nor at any station where such free delivery service is maintained, beyond the delivery limits established by the Pacific Express Company at the date hereof, unless expressly agreed upon and an additional compensation is paid therefor.

For The Pacific Express Company,

—— ——, *Agent.*

The liability of this Company is limited to $50, unless the just and true value is stated in this Receipt and an extra charge is paid or agreed to be paid therefor, based upon such higher value; and such liability ceases on delivery by this Company of property at nearest point to destination it can carry same. Fragile fabrics and fabrics consisting of, or contained in, glass, at owner's risk."

31 Q. Do you know where these liquors are that you shipped as alleged by you in the petition?

A. I don't know where they are now.

Q. Did the defendant express company ever offer to return these packages of liquor here in question to you?

A. With the exception of the very few which are noted hereon, possibly four or five, the express company's drivers have been down at my place of business and presented their bill for the charges for the return of these shipments to Kansas City, and having in their possession at the time the shipments for which they wanted these charges.

Q. Did you pay these express charges, charged by the express company, the defendant, for bringing these liquors back to Kansas City?

A. I did not.

Q. Upon your refusal to pay those charges what was done with the packages of liquor?

A. The employes of the express company would not leave them at my place, but would reload them upon their wagon and take them away again, wouldn't leave them in my possession.

Q. Were any of these liquors mentioned in your petition returned to Kansas City with your consent, by the express company, the defendant?

A. They were not returned with my consent.

Q. Were you consulted in the matter at all?

A. I was not consulted in the matter.

Q. You say when they were returned, they were returned accompanied with a demand for the express charges for bringing them back to you?

A. In each and every instance demand was made for the money charges for transporting them back to Kansas City.

Q. And after you had refused to pay these return charges on these liquors, you may state whether you made any demand upon the defendant for the return to you of the liquors; that is, after they had been brought back to Kansas City.

A. On several occasions I had conversations with Mr. Lewis, the agent of the Company here, and requested the return of these shipments free of charges.

32 Q. You made a condition, upon receiving them, that they not only knock off return charges, but pay you back the going charges?

A. I didn't make that a condition.

Q. Didn't you state you demanded that?

A. I would, certainly. Had these shipments been delivered to me free of charge, I would have accepted them, but I would also have put in a claim for my outgoing charges upon my shipments, upon which I felt the express company had not rendered service.

Said paragraph 11 is in words and figures as follows, to-wit:

"11. C. O. D. Matter:

(*a*) The letters "C. O. D." and amount to be collected must be plainly marked upon each article with which a bill is sent to be collected on delivery, and a similar entry must be made on the way-bill. If shipper requires collection of charges for return of money, the C. O. D. envelope and package must be plainly marked "C. O. D. $— and return charges," and be so way-billed.

(*b*) Aggregating C. O. D. Matter. When two or more packages are sent to same consignee at the same time, with separate C. O. D.'s, they must not be aggregated; but if one C. O. D. covers two or more packages, they may be aggregated as provided in Rule 7. When a C. O. D. covers two or more packages, the amount of C. O. D. must be marked on each, thus: "C. O. D. $— on 2" or "3," as the case may be.

(*c*) Allow Examination or partial delivery of C. O. D. Matter only when instructions to do so are written or printed on, or enclosed in the C. O. D. envelope accompanying the shipment, or upon subsequent written authority from the shipper endorsed by the

33 agent at shipping point. Agents at shipping points will decline to accept C. O. D. shipments with instructions to allow examination or partial delivery, or to subsequently approve shippers' instructions to such effect until shippers execute a release in legal form, exempting this company and its connections to which the matter may be transferred to complete transportation from all loss incident to such examination or partial delivery. The proceeds of each Partial Delivery must be remitted without delay, subject to the regular charge for paid C. O. D.'s, prepaid or collect, according to instructions on original C. O. D. wrapper. No Partial Delivery shall be made until the total amount of freight charges has been paid.

Provided that Partial Delivery shall not be made when the contents of a package are to be delivered to different parties. When

goods are sent on approval, involving but one payment, proceeds for the articles selected must be remitted in the C. O. D. wrapper, the remainder of the goods to be re-packed and immediately returned to the shipper.

(*d*) The Amount of C. O. D. Bills for C. O. D. shipments Must be Collected at the Time such Shipments Are Delivered to Consignees. Agents are positively prohibited from giving credit on C. O. D. shipments.

(*e*) All Orders to Deliver C. O. D. Goods without collecting C. O. D. must have the approval of the agent of the company at the shipping point.

(*f*) Pay no Attention to Orders Sent Direct by Shippers, and even when sent by express with the agent's approval, if in doubt as to the genuineness of such approval, hold goods until satisfied by proper inquiry before making delivery.

(*g*) When C. O. D. Matter is, by order of shipper, through the agent at point of shipment, delivered without collecting, return the C. O. D. bill and envelope with copy of order enclosed, way-billed free, retaining the original order on file.

(*h*) After a C. O. D. Shipment has been forwarded from
34 shipping point, if shipper requests that the shipment be delivered to another consignee, or that the amount of the C. O. D. be reduced, or that the consignee be relieved of payment of charges, or when the entire amount of the C. O. D. is cut off, the shipping agent will require a fee of 10 cents to be paid before endorsing such instructions; shippers' request must then be way-billed with charge of 10 cents, prepaid; when two Companies are interested in the transaction the 10 cent charge will be divided equally.

(*i*) If C. O. D. Matter is refused or cannot be delivered within 24 hours, the shipper must be immediately notified, and if not disposed of within thirty days of such notice, it may be returned subject to charges both ways. If the shipper, after receiving notice of non-delivery from destination agent, requests that the shipment be held for a further period, it may be granted, but it must not be held longer than 60 days after date of shipment, and forwarding agents are forbidden to make any agreement with shippers to hold the goods for a longer period.

When a C. O. D. shipment is accepted, with instructions from shipper, or subsequently ordered through the agent at shipping point, to be returned in a less period than 30 days, such instructions must be strictly observed. C. O. D. packages that have been forwarded from one point to another, on order of shipper may be held for 30 days from date of re-shipment.

Where goods have been shipped by freight and a Bill of Lading for same sent by express C. O. D., the notice of non-payment shall not be given before the arrival of the goods at destination.

(*j*) C. O. D. Matter, and paid C. O. D.'s returned to shippers, must take the same route and pass through the hands of the same Company or Companies as when originally forwarded, provided, that when a C. O. D. shipment has been re-shipped from the original

lestination to which it was addressed, to another destination, it may e returned to the office at which it originated by the most direct oute.

(*k*) When a C. O. D. is received in transfer and the proceeds are to be returned to an office of the Company collecting other than the point of origin, such proceeds may be returned direct by the Company making the collection.

(*l*) C. O. D.'s and collections between the United States and other ountries. Shippers desiring currency or coin different from that urrent where col-ection is to be made, must write their instructions lainly on C. O. D. bill or collection.

(*m*) Each returned shipment C. O. D. must be charged the same mount as was charged for the outward shipment, except that when vo or more shipments are ordered back by the same shipper, from ie same place, at the same time, such returned packages may be ggregated as provided in Rule 7."

Mr. Watson: I offer in evidence law passed by the legislature of e state of Texas on February 12th, 1907, and found in the General ws of the State of Texas, passed by the State Legislature at its ssion convened January 3rd, 1907, and adjourned April 12th, 907, certified on the part of the state of Texas by L. T. Dashiell, cretary of State.

Said section was here marked by the stenographer Exhibit "21" d is in words and figures as follows, to-wit:

axes—Imposing Occupation Tax on Persons, Firms or Corporations Handling Liquors C. O. D.

H. B. No. 53.

Chapter IV.

Act imposing an annual occupation tax upon each office or place kept and maintained by any person, firm or corporation in this tate at which intoxicating liquors legally deliverable are delivered pon payment of purchase money therefor, providing a penalty or failure to pay such tax, and declaring an emergency.

ection 1. Be it enacted by the Legislature of the State of Texas: Any person, firm or corporation doing business is this State shall, at each office or place kept, operated or maintained by such person, firm or corporation at which intoxicating liquors lly deliverable are delivered upon payment of purchase money refore commonly designated as shipments C. O. D., pay annually each office or place so kept an an-ual occupation tax to the State Texas of five thousand dollars, and any county or any incorpod city or town wherein such office or place is located, may levy annual occupation tax upon such person, firm or corporation ein referred to for each of said offices not to exceed one-half of amount hereby levied by the State, such tax to be due and pay- annually.

Sec. 2. The maintaining or operating such office or offices place or places by any person, firm or corporation in this State without paying the occupation tax required in section one of this Act shall subject such person, firm or corporation so operating and maintaining such office or offices place or places, to pay to the State of Texas the sum of fifty dollars, and to the county and any incorporated city or town in which said offices or places are located, each the sum of fifty dollars for each day such office or offices, place or places may be maintained or operated for each office or place so operated; and the State or county or any incorporated city or town may sue for and recover either jointly or severally, each the said sum, for each day that each of said offices or places may be maintained and operated without prepayment of the aforesaid occupation tax.

Sec. 3. The fact that persons, firms and corporations are doing an extensive business in shipping and delivering intoxicating liquors in this State at their various offices or places on the payment of the purchase money therefor and are paying no occupation tax for such privilege, creates an emergency and an imperative public necessity for the suspension of the Constitutional rule requiring bills to be read on three several days in each house, and that this act take effect from and after its passage, and it is so enacted.

(Note.—The enrolled bill shows that the foregoing act passed the House of Representatives by the following vote, yeas
37 104, nays 3; was referred to the Senate, amended and passed by the following vote, yeas 29, nays 0; the House concurred in Senate amendments by the following vote, yeas 94, nays 4.)

Approved February 12, 1907.

Became a law February 12, 1907."

Mr. Rosenberger: The plaintiff objects to the admission in evidence of this law or statute for the reason that, in so far as it has any application to the liquor shipments here in question, it contravenes Section 8 of Article 1 of the Constitution of the United States, which provides that the Congress of the United States alone shall have power to regulate commerce between the several states, in this, that in so far as sought to be applied to the shipments here in question, the legislation offered lays a burden upon interstate commerce and is therefore void. We object to the admission in evidence of this law for the further reason that even if it were constitutional and valid, which is denied, still there is nothing in its provisions which would justify the defendant for its conduct in this connection in refusing to make these deliveries.

Q. Mr. Lewis, I will ask you to state about how much revenue you derive from lots of these offices in Texas; the revenue from these offices where you deliver C. O. D. packag-s of liquor?

Mr. Rosenberger: I object to this line of testimony for the reason it is incompetent, irrelevant and immaterial, and that, even if it were assumed this legislation were valid, aven if it were assumed it rendered it impossible for the defendant to carry out its contract, that this legislation would still be no justification to the defendant.

The Court: I see the point that you make. Of course, we cannot say at this stage what position the authorities will take, but I might say this, although a company might make a contract to deliver, yet, if the state should make a law prohibiting it after it got there, would the carrier be liable for damages for not delivering something when the state refused to let them deliver it?

Mr. Rosenberger: Our position is that where a carrier has made a contract to carry from one state into another, that it is held to the performance of that contract, notwithstanding legislation of a foreign state has made the performance more expensive or burdensome, or even impossible.

The Court: I will reserve the ruling.

38 And thereafter, and during the said March term, to-wit, on Saturday, May 15, 1909, the Court, under the evidence and declarations of law given by the Court, found the issues in favor of the plaintiff, and judgment entered accordingly; to which action, order and ruling of the Court defendant at the time duly excepted.

And within four days thereafter, and during the said March term, to-wit, on Wednesday, May 19th, 1909, defendant filed its motion for new trial, which said motion is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County at Independence, Missouri.

ABRAM ROSENBERGER, Plaintiff,
v.
PACIFIC EXPRESS COMPANY, Defendant.

Motion for a New Trial.

Now comes defendant within four days allowed by law after verdict herein and moves the court to grant it a new trial herein for the following reasons, to-wit:

39 First. Because the verdict and judgment of the court is against the law, and the evidence and the weight of the evidence.

Second. Because the court erred in admitting illegal, incompetent and irrelevant testimony offered by plaintiff over the objection and exception of the defendant herein.

Third. Because the court erred in excluding legal and competent evidence offered by defendant.

Fourth. Because under the pleadings and evidence the verdict and judgment should have been for defendant and against plaintiff.

Fifth. Because the court erred in giving each and every instruction on behalf of plaintiff.

Sixth. Because the court erred in refusing to give legal instructions asked by defendant and refused by the court and in refusing

to give each and every instruction asked by defendant the court erred against defendant.

Seventh. Because the court erred in giving each and every instruction given by the court upon its own motion, and herein the court erred against defendant.

Eighth. Because the court erred in refusing to give each and every instruction asked by defendant.

Ninth. Because the court erred in refusing to instruct that under the Statute of Texas offered and read in evidence the defendant was relieved from its obligation to collect the C. O. D. charges on said liquor, and was in duty bound to obey said law until declared unconstitutional by some court of competent jurisdiction, and in refusing to give such declarations of law the court did not give full faith and credit to such law of Texas as required by Section 1, of Article 4 of the Constitution of the United States, and herein the court took from defendant its right to protection given by said Provision of the Constitution of the United States and erred against defendant in doing so.

Tenth. Because the court erred in holding that defendant had no right under its contract read in evidence and the Tariff Sheet
40 filed with the Interstate Commerce Commission, and read in evidence to exact any return charges for bringing back the goods in question to Kansas City, and in so holding the court erred in not giving the Inter-State Commerce Law full force and effect as construed by the Supreme Court of the United States and the United States Courts of Appeal, and herein the court denied rights given to it by said Inter-State Commerce Act and its regular tariff sheet fixing its rates.

Eleventh. The court erred in holding that under defendant's published tariff rates on file with the Inter-State Commerce Commission wherein it charged all shippers for returning goods the regular tariff rate therein specified, that defendant had no right to charge its regular published tariff rate for such service, and in so holding the court denied defendant its rights given under said Inter-State Commerce Act, and in effect compelled defendant to return said goods in violation of its printed tariff rates on file with said Inter-State Commerce Commission, and herein the court erred against defendant.

Twelfth. Because the court did not give full faith and credit to the statutes of Texas read in evidence, in this that it did not give said Act of Feb. 12th, 1907, the same force and effect here as said act has in the state of Texas, and in so holding the court denied rights given to it by Sec. 1 of Art. 4, Constitution of United States and a new trial should be granted for such reason.

Thirteenth. Because the court erred in holding defendant had no right to charge for return of plaintiff's packages under its published tariff sheet on file with the Inter-State Commerce Commission at the time said shipment was made and in so holding the court deprived defendant of rights given to it by said Inter-State Commerce Act and in so holding denied to defendant the right to charge for such return service in accordance with said published tariff sheet.

Fourteenth. The court erred in holding the Statute of Texas

passed Feb. 12th, 1907, was not valid and binding on plaintiff and defendant until set aside by a court of competent jurisdiction as unconstitutional and void, and erred in holding the defendant
41 was bound to carry out its contract to collect said charges in violation of said Statute and in so holding the court violated Section 1, Article 4, of Constitution of the United States in that it did not give full force and effect to said law, as it had in the state of Texas, and also deprived defendant of its property without due process of law, because it obeyed said Texas Statute aforesaid, and denied to defendant the equal protection of the laws, in requiring it to deliver and collect C. O. D. charges in violation of said law or be held guilty of conversion in not doing so, and in so holding, it deprived defendant of its property without due process of law, and denied to defendant the equal protection of the laws.

Wherefore defendant prays the court to set aside said verdict and judgment thereon and to grant it a new trial for the reasons above given.

DOUGLASS & WATSON,
Attorneys for Defendant.

And thereafter, and during the June term, to-wit, on Wednesday, June 23rd, 1909, said motion for new trial coming on to be heard, the court, after due consideration thereof, overruled said motion for new trial; to which action, order and ruling of the Court defendant at the time duly excepted.

42 In the Supreme Court of Missouri, Division No. One, October Term, 1913, January 9th, 1914.

16502.

"ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Come now the said parties by Attorney, and after argument herein, submit this cause to the Court."

Thereafter, to-wit, on March 3rd, 1914, the following further proceedings were had and entered of record in said cause:

"ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Appeal from Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge

that the judgment aforesaid, in form aforesaid, by said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)"

Which said opinion is in words and figures as follows, to-wit:

43 In the Supreme Court of Missouri, April Term, 1914, Div. No. 1.

(No. 16502.)

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Statement.

This is a suit in conversion.

The facts of this case are undisputed and are briefly as follows:

The plaintiff, at all the times hereinafter mentioned was a wholesale liquor dealer in Kansas City, Missouri, transacting business in the ordinary manner throughout the United States; and the defendant, the Pacific Express Company, a common carrier, was during said times engaged in carrying express matters throughout the United States, and especially from the State of Missouri to the State of Texas.

That shortly prior to February 12th, 1907, the plaintiff delivered to the defendant, express prepaid, certain packages of liquor to be transported by it to the former's customers in the state of Texas; the delivery thereof to be made on the payment of the price thereof, as will be presently stated.

On said February 12th, 1907, the State of Texas duly enacted a statute imposing an occupation tax on all persons and corporations "handling liquors C. O. D." The license or tax imposed by the statute was $5,000 a year at each place maintained for that purpose.

That after the acceptance of said liquors by the defendant and prior to their delivery, said statute went into effect, and the defendant refused to deliver the packages or to collect the price thereof, and after due notice returned the same to the plaintiff at

44 Kansas City, where they offered to deliver them to the plaintiff, upon condition that he pay the return express charges thereon. The plaintiff refused to pay said charges, and to accept said goods, and the defendant now holds the same, as it claims, for the use of the plaintiff.

The plaintiff instituted this suit in the Circuit Court of Jackson County against the defendant for converting said goods to its own use.

The terms and conditions of the contract of carriage and delivery to be subsequently mentioned, made and entered into by and between the plaintiff and defendant was in writing, and expressed in a receipt given to the former by the latter upon the receipt of the goods for shipment.

This receipt is the ordinary one given by express companies to the consignor of goods; and paragraph Six thereof, the one relating to the C. O. D. question involved in this case, reads as follows:

"If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the above described property and the same is not paid for or if in any case the consignee cannot be found, or for any other reason it cannot be delivered, the shipper agrees that this company may return said property to him subject to the conditions of this receipt, and that he will pay all charges for transportation, etc." By paragraph 3 of the same contract it is also provided that "defendant shall not be liable for any loss or damages by act of God, or of the enemies of government, or by the restraint of government," etc.

That after the taking effect of the Texas statute the defendant notified the plaintiff that if he would release the C. O. D. contract it would deliver the goods to the consignee; this the plaintiff re-
45 fused to do, but insisted on the defendant carrying out its contract of shipment and delivery and that it deliver the packages to the consignee and collect the C. O. D. charges which it refused to do; but upon the contrary ordered its agent to return the liquor to Kansas City, and charged the return express charges to the plaintiff as previously stated.

Opinion.

I.

Counsel for appellant ask for a reversal of the judgment of the circuit court for two reasons; first, because it held that the statutes of Texas, mentioned, was no excuse or justification for the defendant's refusal to deliver the packages mentioned; second, because the undisputed evidence shows that if the defendant is liable to the plaintiff in any manner, it is for a breach of contract and not for a conversion of the goods.

We will dispose of these propositions in the order stated.

Regarding the first: It is confidently insisted by counsel that the Texas statute is a perfect bar to plaintiff's right of recovery in this case.

This insistence is predicated upon the fact that the Court of Civil Appeals, of Texas, in the case of Craddock & Co. v. Wells-Fargo Express Co., 125 S. W. 59, held said statute to be constitutional and valid, and therefore, under the well known rule of law, to the effect that where one agrees to do an act lawful at the time, and subsequently thereto the legislature passes a law making the performance of that act illegal, the contract of performance is thereby annulled. Church v. New York, 5 Cow. 538; Cordes v. Miller 39 Mich. 584; Stone v. Mississippi, 101 U. S. 814. Of course this rule only applies

to contracts and statutes relating to matters embraced within the police power of the state.

Counsel for plaintiff with equal confidence contend, that
46 while the Texas statute may be valid, as a defense to intra-state shipments, like the Craddock case, supra, yet it has no application to interstate shipments like the present case, where the liquor was shipped from one state to another. This class of cases, it is contended, is governed by the interstate commerce clause of the constitution of the United States, and that if the Texas statute is intended to apply to shipments of this character, then it is unconstitutional and void. So, in no event it is insisted, can that statute constitute a bar against plaintiff's right to a recovery in this case. In support of this proposition we are cited to many cases, and among others Adams Express Co. v. Kentucky, 206 U. S. 129; American Express Co. v. Iowa, 196 U. S. 133; Norfolk v. Ry. Co. v. Sims, 191 U. S. 441; Allen v. Pullman Co. 191 U. S. 171. None of these cases involved the phase of the C. O. D. question here presented; and in approaching its consideration it should be borne in mind that the duty to receive, transport and deliver articles of commerce by a common carrier is imposed by law, subject of course to reasonable limitations and regulations, and not by contract; while the C. O. D. question, that is the collection of the purchase price of the articles transported by the carrier at the time of their delivery to the consignee and the return of the purchase price to the consignor by the carrier is a duty imposed by contract, and not by law. In other words, the carrier is under no legal obligation, in the absence of some statute, to collect the puschase price of goods carried without it contracts to so do.

And a breach of the former duty by the carrier is a violation of the law of the state or of the United States, as the case may be, and the law provides a remedy for that wrong; but the breach of the latter, the contractual duty, is the violation of the contract for which the law also provides a remedy, but the two remedies are different, notwithstanding both may have been assumed by the carrier at the same time regarding the same article of commerce.
47 And because of this two-fold duty of the carrier, it is entitled to charge a reasonable sum for transporting and delivering the goods, and an additional and separate sum to be agreed upon by the parties for the collection and return of the purchase price of the goods.

Under this view of the question, I am unable to see from what possible viewpoint it could be considered that the questions (1) of with-holding the delivery of articles of commerce transported by the carrier; (2) the storage of the same until such time (not the reasonable time for their delivery) as the consignee is able and willing to pay for them; (3) and the collection of the purchase price thereof from the latter, has to do with either state or interstate commerce.

Suppose, for instance, that an express company should today receive from me in Jefferson City, Missouri, two boxes of cigars one to be carried to John Smith at St. Joseph, Missouri, and the other to

John Jones in Austin, Texas, and that in pursuance to its ordinary legal duties the company should carry the cigars to their respective points of destination and deliver them within a reasonable time to the respective consignees, would the mere fact that the express company neglected or expressly refused to agree to do the three things before mentioned, interfere in any manner with either state or interstate commerce? It seems to me that it would not, for the simple reason that the performance or nonperformance of all three of those matters rest- solely upon contract, and I know of no law that requires the express company or any other carrier to make or enter into a contract of that kind or for any other purpose.

If this is true, and it seems to me that it is unquestionably so, then how are we in this case going to escape that other well known rule, namely, that the things that are to be performed in the execution of the contract are governed by the law of the State
48 where the contract is to be executed. I am not now speaking of inter-state commerce or any of the things that are incidental to the free and untrammeled transportation and delivery of all articles of commerce. But I am speaking of all contracts affecting the use of all classes of property, whether produced in a State or shipped there from another; or from some foreign country, which, however, as I have tried to state are independent of and do not in any manner interfere with or stifle inter-state commerce, as I tried to show by the supposed case previously stated.

Such a contract would have nothing whatever to do with the transportation and delivery of the cigars within a reasonable time, but would go further and obligate the express company to attach to its duty as a common carrier, to transport and deliver goods within a reasonable time, an additional obligation, (not a duty in a strict sense) to retain and store the same for a period beyond the reasonable time fixed by law for that purpose and thereby and from that time, convert the carrier into a public storage company and collection agency, which would be wholly independent of its duties as a common carrier; and as clearly in violation of the law of Texas as if the goods had been shipped to John Smith, as agent of the consignor, with directions to receive the same from the express company and store the same until the purchaser should call for and pay him the purchase price thereof.

That being unquestionably true, then why would not the storage of the goods and the collection of the purchase price be governed by the laws of the State where they were to be stored and where the money is to be collected.

Suppose again, that instead of cigars, the shipment had consisted of gasoline, gun-powder, dynamite or nitro-glycerine, would it be seriously contended that the laws of Texas would not govern
49 their storage, after the lapse of a reasonable time for its delivery, notwithstanding the agreement of the express company that it would hold the same in its office or store-house for thirty days, or any other time beyond a reasonable time required for its delivery? Certainly not.

Carriers of inter-state commerce, the same as the consignees thereof,

must obey the storage laws of the State where located, and that duty cannot be evaded by the consignor and the carrier, or any one else, entering into a contract obligating itself or himself to retain the goods beyond a reasonable time for their delivery in violation of a State law, in order that the purchaser may have time in which to pay the purchase price.

In other words, a carrier of interstate commerce is equally subject to the ware-house and storage laws of a State as are the ordinary citizens of that State engaged in the storage and warehouse business, and the mere fact that the carrier may see proper to add to its ordinary duties of a common carrier, and additional contractual obligation not to deliver the goods within a reasonable time, will not exempt the carrier from the State laws governing the storage of goods, and the laws thereof governing the collection of debts.

And especially should this be, where the State law relates to the contractual delay duty of delivery of the carrier concerning intoxicating liquors, which all courts in christendom hold is within itself a nuisance, and that the liquor business is also unlawful, except where authorized by statute.

State v. Distilling Co. 236 Mo. 219, where many of the cases, State and Federal, are cited and considered, bearing upon that question.

These suggestions illustrate the principle of law I have in mind, namely, that the storage of goods after their delivery, or after the lapse of a reasonable time for their delivery, is a separate and independent matter from either state or interstate commerce, and
50 is and must be governed by the storage laws of the State where they are located, and as a necessary sequence, the collection of the purchase price of the goods, at least, after the storage period has begun, is and must be governed by the laws of the State where they are located, and the collection is to be made.

While I believe that the Constitution of the United States is the greatest and wisest instrument ever written for the government of a great nation, and especially the commerce clause thereof, of which so much has been said and written, yet I do not believe that its wise and useful purpose was designed for, or should be used as a shield for the protection of designing persons engaged in a business prohibited by the laws of any State, so long as those laws do not in any manner interfer- with the transportation and delivery of articles shipped from one State to another, or from a foreign country. Of course, I am not considering the questions of taxation of articles of importation, etc., but am trying to confine my observations to the single question in hand.

But it has been suggested: Suppose liquors should be shipped today from Kansas City to Austin, Texas, C. O. D., and the contract should be silent as to the time of delivery, which would of course mean a reasonable time, and within that time, the goods should be delivered and the purchase price paid to the carrier?

In answer to that suggestion I would say that no such case is before the court; but by way of obiter I would say that in principle there would be no difference in the two cases, for the reason that the legal duty of the carrier to ship and deliver the goods, and the con-

tract or agreement to collect the purchase price, etc., are not so interdependent as to prohibit the legislature from segregating the former from the latter, and enacting laws in the nature of police regulations regarding the collections.

And no fair minded disinterested man can read this record without reaching the conclusion that the C. O. D. contract men-
51 tioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof; and in order to meet this evil the statute of 1907 was by the legislature of that State enacted, and not for the purpose of interfering with state or interstate commerce.

It has been suggested that if such a statute is upheld, then the legislature of a state might, under the guise of regulating the storage of property and the collection of money might thereby interfere with and stifle interstate commerce.

In answer to that suggestion, I simply refer the parties to the able, well considered and patriotic opinions in the cases of Express Company v. Kentucky, supra; American Express Co. v. Iowa, supra; and Heyman v. Southern Railway Co., 203 U. S. 270, with the added observations that the Supreme Court of the United States, in the future, as in the past, will never lend countenance to any rule, statute or judicial ruling of any State authorizing the erection of a wall of any kind against free intercourse and the transportation of persons and property from one State to another.

Believing as I do, that said statute does not in any manner operate in restraint of interstate commerce, I am clearly of the opinion that the same is a valid enactment, as was held by the Texas Civil Court of Appeals in the case of Craddock v. Wells-Fargo Express Company, supra.

I am, therefore, of the opinion that when said statute went into effect, it was a valid police regulation and a legal excuse for the defendant's refusal to deliver the liquors and collect the purchase price thereof.

Opinion.

II.

Regarding the second reason assigned by defendant for a reversal of the judgment, namely, that if it is liable at all to the plaintiff, it is not for a conversion of the liquor shipped, but for damages
52 for a breach of the C. O. D. contract, as before defined, for nondelivery of the liquors and not collecting the purchase price thereof, as therein provided.

If we are correct in holding in paragraph One of this opinion that the C. O. D. contract mentioned was separate and independent of the defendant's duty as a common carrier to transport and deliver the packages within a reasonable time, then clearly, under the undisputed evidence that the defendant still has the packages and offers to return them to the plaintiff upon the payment of the express charges from Texas to Kansas City, there could be no conversion.

These facts do not constitute a conversion of the liquors, but a

breach of the C. O. D. contract, which took effect after the def
ant's duty to the plaintiff as a common carrier had terminated.

Entertaining these views I am of the opinion that the judgmen
the circuit court should be reversed; and it is so ordered.

All Concur, exc , Bond, J., and Faris J. who dissents.

A. M. WOODSON,

53 In the Supreme Court of Missouri, Division One.

No. 16502.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Motion of Respondent to Transfer Cause to Court En Banc.

Now comes respondent and prays the court that the above enti
cause may be transferred to the court en banc for its decision
states that the above entitled cause was in Division No. One deci
adversely to the respondent; that this application is made pursu
to Section 4, of the Amendment of 1890 of the Constitution of M
souri, which provides that when a federal question is involved,
cause on application of the losing party shall be transferred to
court for its decision; that in this cause the respondent was a wh
sale liquor dealer in Kansas City, Missouri; that appellant wa
common carrier and shipped merchandise for respondent C. O.
to various points in the State of Texas; that the State of Texas
February 12th, 1907, enacted a statute imposing an occupation
on all persons and corporations delivering liquors C. O. D. in
State of Texas; that after the acceptance of said liquor by said
pellant and prior to its delivery in Texas, said statute of Texas w
into effect and the appellant refused to deliver the packages or
collect the price thereof and after due notice returned the same
the respondent at Kansas City where the appellant offered to deli
same to the respondent on the condition that he pay the
54 turn express charges thereon. The respondent refused to p
said charges and accept said goods and sued the appellant
conversion.

That the contracts and obligations of transportation and delive
were in fact interstate commerce contracts and the shipmen
thereunder were interstate shipments and were governed by the Co
stitution and the laws of the United States as prescribed by the Co
stitution of the United States in Article 1, Sections 8 and 10.

That said decision is contrary to and in contravention of Sectio
8 and 10 of Article 1 of the Constitution of the United States.

Wherefore, The respondent, the losing party herein, prays th
the above cause may be transferred to the Court for its decision.

A. F. SMITH,
ROZZELLE, VINEYARD &
THACHER,
Attorneys for Respondent.

In the Supreme Court of Missouri, April 2nd, 1914.

16502.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Now at this day the Court having considered and fully understood the motion of the said Respondent for rehearing herein, doth order that said motion be, and the same is hereby overruled. It is further considered and ordered by the Court that the motion of said Respondent to transfer said cause to Court in Banc be sustained and that said cause be and the same is hereby transferred to Court in Banc.

55 In the Supreme Court of Missouri, in Banc, April Term, 1914.

And thereafter, on May 6th, 1914, the following further proceedings were had and entered of record in said cause, to-wit:

16502.

"ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Come now the said parties, by attorney, and after argument herein, submit this cause to the Court, with leave of five days to the said Appellant to file brief and five days thereafter to said Respondent to file reply."

And thereafter, to-wit, on May 20th, 1914, the following further proceedings were had and entered of record in said Court:

"ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled, and for naught held and esteemed, and that the said Appellant be restored to all things which it has lost by reason of the said judgment; and that the said Appellant recover against the said Respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)"

The Court in Banc adopted the Divisional opinion.

56 In the Supreme Court of the United States.

ABRAM ROSENBERGER, Plaintiff in Error,
vs.
PACIFIC EXPRESS COMPANY, Defendant in Error.

Præcipe.

To the Clerk of the Supreme Court of Missouri:

You are hereby requested and directed to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to a writ of error allowed in the above entitled cause, being case No. 16502 in the Supreme Court of Missouri, and to incorporate (by original or by copy as may be proper) into the transcript of record the following pages and exhibits, to-wit:

1. Insert the petition for a writ of error and order of Honorable Henry Lamm, Chief Justice of the Supreme Court of Missouri, allowing the said writ of error; assignment of errors; the writ of error, bond and supersedeas; citation and entry of appearance, and order for enlargement of time for docketing this case and filing the record thereof.

2. Insert the transcript of judgment of the Circuit Court of Jackson County, Missouri, at Independence, being case Number 17855 in said Circuit Court, and order allowing appeal to the Kansas City Court of Appeals, being the transcript originally filed in said cause.

57 3. Insert the judgment of the Kansas City Court of Appeals transferring said cause to the Supreme Court of Missouri.

4. Insert the following recital:

"This case and the case of Abram Rosenberger v. Wells Fargo & Company involve the same questions, were tried together by agreement of parties in the Circuit Court of Jackson County, Missouri, and by agreement of parties were argued together in the Supreme Court of Missouri and were decided together by that court. Since the decision of the cases in the Supreme Court of Missouri, the parties in the case of Abram Rosenberger v. Wells Fargo & Company have stipulated and agreed that the judgment in said case shall abide the decision in the above entitled case."

5. Insert the following portions of the printed abstract of the record filed in the Kansas City Court of Appeals and transferred to the Supreme Court of Missouri, being the abstract of the record on which the case was heard and determined in the Supreme Court of Missouri:

(*a*) Insert the first paragraph on page 1; also insert beginning with the words on page 3 "Petition in Pacific Express Company case" and continuing through the second paragraph on page 4 ending with the words "together with the costs in this behalf expended."

(*b*) Insert on page 5 the second paragraph, which paragraph

begins with the words "The defendant Pacific Express Company," etc., and continue through page 6 down to the word "Replies."

(*c*) Insert from the record on page 6 the following paragraph: "Plaintiff's reply to defendant Pacific Express Company's answer was in the nature of a general denial."

(*d*) Insert the last paragraph on page 6 of the printed abstract of record beginning with the words "Record Entries" and also insert all of pages 7, 8, 9, 10, 11, 12, 13 and page 14 down to and including the words, "This stipulation was executed by the plaintiff and each of the defendants in each of said actions."

58 (*e*) Insert the testimony of Abram Rosenberger beginning on page 40 of said printed abstract of the record and continuing down to and including all of the testimony on page 41 except the last two lines on page 41; beginning with the third question on page 43 and continuing on down to the end of Exhibit No. 17 as it appears on pages 44, 45, 46 and 47 of said printed abstract of the record; insert the first four questions and answers on page 49; insert the last question and answer on page 50 and the first three questions and answers on page 51; insert the sixth and seventh questions and answers on page 70.

(*f*) Insert paragraph 11 of Exhibit No. 3 and the offer thereof in evidence as the same appears on pages 87, 88, 89 and 90 of said printed abstract of the record.

(*g*) Insert offer by Mr. Watson of Exhibit 21, being the statute of Texas described in the offer thereof in evidence, which offer begins with the words, "Mr. Watson: I offer in evidence law passed by" etc., and also the exhibit itself as it appears on pages 93, 94 and 95 of said printed abstract of the record; also the remaining portion of page 95 and page 96, down to and including the words, "The Court: I will reserve the ruling."

(*h*) Insert the recitation of the abstract of the record showing the finding of the court, defendant's motion for a new trial and the overruling thereof, beginning with the first line of the second paragraph on page 104 of the printed abstract of the record, said first line of said paragraph reading as follows: "And thereafter and during said March Term", and continuing through the first paragraph following said motion for a new trial on page 107 of said printed abstract of the record.

59 6. Insert opinion of the Supreme Court of Missouri in this case.

7. Insert motion filed by Abram Rosenberger, plaintiff in error herein, for the transfer of this case to the Supreme Court of Missouri in banc.

8. Insert order of the Supreme Court of Missouri sustaining the motion to transfer said case to the Supreme Court of Missouri in banc.

9. Insert final judgment of the Supreme Court of Missouri in banc reversing this case.

Insert this recital:

"The court in banc adopted the divisional opinion."

10. Insert this præcipe.

11. Add your certificate.

12. Upon completion of said transcript the clerk of the Supreme Court of Missouri shall file the same with the Clerk of the Supreme Court of the United States.

FRANK F. ROZZELLE,
J. J. VINEYARD,
A. F. SMITH,
Attorneys for Plaintiff in Error.

Due service of the above and foregoing præcipe is hereby acknowledged and accepted this 4th day of September, 1914, for and on behalf of the aforesaid Pacific Express Company, defendant in error in the above entitled cause.

I. N. WATSON,
Attorney for Defendant in Error.

59½ [Endorsed:] In the Supreme Court of the United States. Abram Rosenberger, Plaintiff in Error, vs. Pacific Express Company, Defendant in Error. Præcipe. Filed Sep. 5, 1914. J. D. Allen, Clerk.

60 In the Supreme Court of Missouri.

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full true and correct copy of the proceedings and papers filed in said cause, as fully as called for in the præcipe filed by Plaintiff in Error herein, as fully as the same appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of our said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 8th day of September, 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court, State of Missouri.

Endorsed on cover: File No. 24,370. Missouri Supreme Court. Term No. 249. Abram Rosenberger, plaintiff in error, vs. Pacific Express Company. Filed September 19th, 1914. File No. 24,370.

No. 249

IN THE

Supreme Court of the United States.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

VS.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

Motion by Defendant in Error to Dismiss Case for Want of a Federal Question Authorizing a Writ of Error from the Supreme Court of the United States.

I. N. WATSON,
Attorney for Defendant in Error.

J. L. MINNIS, *of Counsel.*
On Briefs.

No. .....

IN THE

reme Court of the United States.

BRAM ROSENBERGER, PLAINTIFF IN ERROR,

VS.

IFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

on by Defendant in Error to Dismiss Case for ant of a Federal Question Authorizing a Writ of Error from the Supreme Court of the United States.

Now comes defendant in error and moves this hon-e court to dismiss the writ of error heretofore l to the Supreme Court of the State of Missouri he following reasons, to-wit:

1. That in the Supreme Court of the State of ouri, the appellant in said case, to-wit, The Pacific ess Company, contended that if it was liable at all r the facts stated in plaintiff's petition and the evi-e it was not for a conversion of the liquor shipped,

but for damages for the breach of the C. O. D. contract for the non-delivery of the liquors and not collecting the purchase price thereof, as therein provided; that the Supreme Court of the State of Missouri passed upon this assignment of error and sustained the same, and rendered an opinion reversing the judgment of the trial court, as follows:

> "Woodson, P. J. (after stating the facts as above).
>
> 1. Counsel for appellant ask for a reversal of the judgment of the Circuit Court for two reasons: First, because it held that the statutes of Texas, mentioned, was no excuse or justification for the defendant's refusal to deliver the packages mentioned; second, because the undisputed evidence shows that if the defendant is liable to the plaintiff in any manner, it is for a breach of contract, and not for a conversion of the goods. We will dispose of these propositions in the order stated.
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> Regarding the first: It is confidently insisted by counsel that the Texas statute is a perfect bar to plaintiff's right of recovery in this case. This insistence is predicated upon the fact that the Court of Civil Appeals of Texas, in the case of *Craddock & Co.* v. *Wells-Fargo Express Co.*, 125 S. W. 59, held said statute to be constitutional and valid, and therefore, under the well-known rule of law, to the effect that where one agrees to do an act lawful at the time, and subsequently thereto the Legislature passes a law making the performance of that act illegal, the contract of performance is thereby annulled. *Church* v. *New York*, 5 Cow. (N. Y.) 538; *Cordes* v. *Miller*, 39 Mich. 584, 33 Am. Rep. 430; *Stone* v. *Mississippi*, 101

U. S. 814, 25 L. Ed. 1079. Of course this rule only applies to contracts and statutes relating to matters embraced within the police power of the state.

Counsel for plaintiff with equal confidence contend that, while the Texas statute may be valid as a defense to intrastate shipments, like the Craddock case, *supra*, yet it has no application to interstate shipments, like the present case, where the liquor was shipped from one state to another. This class of cases, it is contended, is governed by the interstate commerce clause of the Constitution of the United States, and that if the Texas statute is intended to apply to shipments of this character, then it is unconstitutional and void. So in no event, it is insisted, can that statute constitute a bar against plaintiff's right to a recovery in this case. In support of this proposition we are cited to many cases, and, among others, *Adams Express Co.* v. *Kentucky*, 206 U. S. 129, 27 Sup. Ct. 606, 51 L. Ed. 987; *American Express Co.* v. *Iowa*, 196 U. S. 133, 25 Sup. Ct. 185, 49 L. Ed. 424; *Norfolk Ry. Co.* v. *Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; *Allen* v. *Pullman Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134. None of these cases involved the phase of the C. O. D. question here presented; and, in approaching its consideration, it should be borne in mind that the duty to receive, transport, and deliver articles of commerce by a common carrier is imposed by law, subject, of course, to reasonable limitations and regulations, and not by contract; while the C. O. D. question, that is, the collection of the purchase price of the articles transported by the carrier at the time of their delivery to the consignee, and the return of the purchase price to the consignor by the carrier, is a duty imposed by contract, and not by law. In other words, the car-

rier is under no legal obligation, in the absence of some statute, to collect the purchase price of goods carried without it contracts to so do. And a breach of the former duty by the carrier is a violation of the law of the state or of the United States, as the case may be, and the law provides a remedy for that wrong; but the breach of the latter, the contractual duty, is the violation of the contract for which the law also provides a remedy, but the two remedies are different, notwithstanding both may have been assumed by the carrier at the same time regarding the same article of commerce. And because of this twofold duty of the carrier, it is entitled to charge a reasonable sum for transporting and delivering the goods, and an additional and separate sum to be agreed upon by the parties for the collection and return of the purchase price of the goods.

Under this view of the question, I am unable to see from what possible viewpoint it could be considered that the questions: (1) Of withholding the delivery of articles of commerce transported by the carrier; (2) the storage of the same until such time (not the reasonable time for their delivery) as the consignee is able and willing to pay for them; (3) and the collection of the purchase price thereof from the latter—have to do with either state or interstate commerce. Suppose, for instance, that an express company should today receive from me in Jefferson City, Mo., two boxes of cigars, one to be carried to John Smith, at St. Joseph, Mo., and the other to John Jones in Austin, Tex., and that in pursuance to its ordinary legal duties the company should carry the cigars to their respective points of destination and deliver them within a reasonable time to the respective consignees, would the mere fact that the express company neglected or expressly refused to

agree to do the three things before mentioned interfere in any manner with either state or interstate commerce? It seems to me that it would not, for the simple reason that the performance or non-performance of all three of those matters rests solely upon contract, and I know of no law that requires the express company, or any other carrier, to make or enter into a contract of that kind, or for any other purpose. If this is true, and it seems to me that it is unquestionably so, then how are we in this case going to escape that other well known rule, namely, that the things that are to be performed in the execution of the contract are governed by the law of the state where the contract is to be executed. I am not now speaking of interstate commerce, or any of the things that are incidental to the free and untrammeled transportation and delivery of all articles of commerce. But I am speaking of all contracts affecting the use of all classes of property, whether produced in a state or shipped there from another, or from some foreign country, which, however, as I have tried to state, are independent of and do not in any manner interfere with or stifle interstate commerce, as I tried to show by the supposed case previously stated. Such a contract would have nothing whatever to do with the transportation and delivery of the cigars within a reasonable time, but would go further and obligate the express company to attach to its duty as a common carrier, to transport and deliver goods within a reasonable time, an additional obligation (not a duty in a strict sense) to retain and store the same for a period beyond a reasonable time fixed by law for that purpose, and thereby and from that time convert the carrier into a public storage company and collection agency, which would be wholly independent of its duties as a common carrier; and as clearly in violation of the law of Texas as if the

goods had been shipped to John Smith, as agent of the consignor, with directions to receive the same from the express company and store the same until the purchaser should call for and pay him the purchase price thereof. That being unquestionably true, then why would not the storage of the goods and the collection of the purchase price be governed by the laws of the state where they were to be stored and where the money is to be collected?

Suppose, again, that instead of cigars, the shipment had consisted of gasoline, gunpowder, dynamite or nitro-glycerine, would it be seriously contended that the laws of Texas would not govern their storage, after the lapse of a reasonable time for its delivery, notwithstanding the agreement of the express company that it would hold the same in its office or storehouse for 30 days, or any other time beyond a reasonable time required for its delivery? Certainly not. Carriers of interstate commerce, the same as the consignees thereof, must obey the storage laws of the state where located, and that duty cannot be evaded by the consignor and the carrier, or anyone else, entering into a contract obligating itself or himself to retain the goods beyond a reasonable time for their delivery in violation of a state law, in order that the purchaser may have time in which to pay the purchase price. In other words, a carrier of interstate commerce is equally subject to the warehouse and storage laws of a state as are the ordinary citizens of that state engaged in the storage and warehouse business, and the mere fact that the carrier may see proper to add to its ordinary duties of a common carrier, an additional contractual obligation not to deliver the goods within a reasonable time, will not exempt the carrier from the state laws governing the storage of goods, and the laws

thereof governing the collection of debts. And especially should this be, where the state law relates to the contractual delay duty of delivery of the carrier concerning intoxicating liquors, which all courts in Christendom hold is within itself a nuisance, and that the liquor business is also unlawful, except where authorized by statute. *State* v. *Distilling Co.*, 236 Mo. 219, 139 S. W. 453, where many of the cases, state and federal, are cited and considered, bearing upon that question.

These suggestions illustrate the principle of law I have in mind, namely, that the storage of goods after their delivery, or after the lapse of a reasonable time for their delivery, is a separate and independent matter from either state or interstate commerce, and is and must be governed by the storage laws of the state where they are located, and as a necessary sequence, the collection of the purchase price of the goods, at least, after the storage period has begun, is and must be governed by the laws of the state where they are located, and the collection is to be made.

While I believe that the Constitution of the United States is the greatest and wisest instrument ever written for the government of a great nation, and especially the commerce clause thereof, of which so much has been said and written, yet I do not believe that its wise and useful purpose was designed for, or should be used as a shield for, the protection of designing persons engaged in a business prohibited by the laws of any state, so long as those laws do not in any manner interfere with the transportation and delivery of articles shipped from one state to another, or from a foreign country. Of course, I am not considering the questions of taxation of articles of importation, etc., but am trying to confine my observations to the single question in hand.

But it has been suggested: Suppose liquors should be shipped today from Kansas City to Austin, Tex., C. O. D., and the contract should be silent as to the time of delivery, which would of course mean a reasonable time, and within that time the goods should be delivered and the purchase price paid to the carrier? In answer to that suggestion I would say that no such case is before the court; but by way of *obiter* I would say that in principle there would be no difference in the two cases, for the reason that the legal duty of the carrier to ship and deliver the goods, and the contract or agreement to collect the purchase price, etc., are not so interdependent as to prohibit the Legislature from segregating the former from the latter, and enacting laws in the nature of police regulations regarding the collections. And no fair minded disinterested man can read this record without reaching the conclusion that the C. O. D. contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof, and in order to meet this evil the statute of 1907 was by the Legislature of that State enacted, and not for the purpose of interfering with state or interstate commerce.

It has been suggested that, if such a statute is upheld, then the Legislature of a state might, under the guise of regulating the storage of property and the collection of money, thereby interfere with and stifle interstate commerce. In answer to that suggestion, I simply refer the parties to the able, well-considered and patriotic opinions in the cases of *Express Co.* v. *Kentucky, supra, American Express Co.* v. *Iowa, supra; Heymann* v. *Southern Railway Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130, with the added observations that the Supreme Court of the

United States, in the future as in the past, will never lend countenance to any rule, statute, or judicial ruling of any state authorizing the erection of a wall of any kind against free intercourse and the transportation of persons and property from one state to another.

Believing as I do that said statute does not in any manner operate in restraint of interstate commerce, I am clearly of the opinion that the same is a valid enactment, as was held by the Texas Civil Court of Appeals in the case of *Craddock* v. *Wells-Fargo Express Co., supra.*

I am therefore of the opinion that when said statute went into effect, it was a valid police regulation, and a legal excuse for the defendant's refusal to deliver the liquors and collect the purchase price thereof.

II. Regarding the second reason assigned by defendant for a reversal of the judgment, namely, that if it is liable at all to the plaintiff, it is not for a conversion of the liquor shipped, but for damages for a breach of the C. O. D. contract, as before defined, for non-delivery of the liquors and not collecting the purchase price thereof, as therein provided. If we are correct in holding in paragraph I of this opinion that the C. O. D. contract mentioned was separate and independent of the defendant's duty as a common carrier to transport and deliver the packages within a reasonable time, then clearly, under the undisputed evidence that the defendant still has the packages and offers to return them to the plaintiff upon the payment of the express charges from Texas to Kansas City, there could be no conversion.

These facts do not constitute a conversion of the liquors but a breach of the C. O. D. contract, which took effect after the defendant's duty to the plaintiff as a common carrier had terminated.

> Entertaining these views, I am of the opinion that the judgment of the Circuit Court should be reversed, and it is so ordered. All concur, except Bond, J., and Faris, J., who dissent."

It therefore appears from the foregoing opinion rendered by the Supreme Court of the State of Missouri that the judgment of reversal rested upon a non-federal ground broad enough to sustain the judgment of reversal, to-wit: That, under the pleadings and evidence, there was no conversion, and that plaintiff in error in this court had brought the wrong action, if he had any; that he should have sued for damages for violation of the special agreement to collect the contract price, and not in conversion.

Wherefore, the defendant in error moves the court to dismiss this writ of error for want of jurisdiction, in that the judgment of the Supreme Court of the State of Missouri does not rest solely upon federal grounds, but that the judgment of the lower court was reversed on a non-federal ground; and there is no federal question decided by the Supreme Court of the State of Missouri, denying plaintiff in error of any right, title, privilege or immunity given by the Constitution or laws of the United States; and no right, title, privilege or immunity given plaintiff in error by the Constitution of the United States, or any law made in pursuance thereof, was denied him by the judgment of the Supreme Court of the State of Missouri.

I. N. WATSON,
Attorney for Defendant in Error.

J. L. MINNIS, *of Counsel.*
On Briefs.

No. [redacted] 248

IN THE

Supreme Court of the United States.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

VS.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

J. L. MINNIS,
I. N. WATSON,
Counsel for Defendant in Error.

No. .....

IN THE

Supreme Court of the United States.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR.

VS.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

Defendant in error asks that the writ of error in this case be dismissed, for the reason that it appears from the opinion rendered by the Supreme Court of the State of Missouri that the judgment was not based upon a Federal ground alone, but that the judgment rested on a non-federal ground, to-wit: That the plaintiff in the trial court had brought the wrong kind of an action; that the facts did not warrant an action for conversion, but at best they afforded an action for damages for violation of a special agreement to collect the C. O. D. charges.

Defendant in error asked for the reversal of the judgment of the trial court for two reasons; First, Because the trial court held that the statutes of Texas mentioned, were no excuse or justification for defendant's refusal to deliver the packages mentioned; Second, Because the undisputed evidence shows that, if the defendant is liable to the plaintiff in any manner, it is for breach of contract and not for a conversion of these goods.

The Supreme Court of Missouri took up each of these points and disposed of them against the contentions of the plaintiff in error in this court. Under the first point, the Supreme Court of the State of Missouri held that the questions raised in the record in this case in the trial court did not involve a question of interstate commerce. The contract of shipment required at the time of delivery that defendant in error collect the C. O. D. charges, and the contract provided for the company holding the goods for thirty days. It did not provide for a delivery within a reasonable time, which is required by law. The law imposed a duty to carry and deliver within a reasonable time, but the duty to collect the C. O. D. charges was imposed by contract.

Hutchinson on Carriers, 3d Ed. Secs. 726-728-729.

U. S. Express Co. v. *Keifer*, 59 Ind. 263.

Elliott on Railroads, Vol. 4, Sec. 1530.

Amr. & Eng. Ency. of Law, 2 Ed. Vol. 12, p. 533.

Cox et al. v. *Rd. Co.*, 91 Ala. 392 (8 So. R. 824.)

Express Co. v. *Commonwealth*, 29 Ky. Law, 529.
Moore on Carriers, Sec. 31.
Hale on Bailments and Carriers, p. 451.
McNichols v. *Express Co.*, 12 Mo. App. 401.
Fowler Com. Co. v. *Rd. Co.*, 98 Mo. App. App. 210.
Danciger v. *Pac. Exp. Co.*, 154 Fed. 379.

II.

The Supreme Court of the State of Missouri rested its decision on the first point partly upon the ground that the scheme devised by the plaintiff in error in this case was a fraud, or a mere subterfuge to avoid the laws of the State of Texas. The Supreme Court of Missouri, in its opinion, says:

> "And no fair-minded disinterested man could read this record without reaching the conclusion that the C. O. D. contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof, and, in order to meet this evil, the statute of 1907 was by the legislature of that state enacted, and not for the purpose of interfering with state or interstate commerce."

It will thus be seen that the Supreme Court of the State of Missouri held that, under the facts in this case, the plaintiff in error was guilty of a fraud practiced upon the State of Texas under the disguise of this C. O. D. contract, and that its decision was not based upon a federal ground, but upon a non-federal ground, to-wit: Fraudulent acts of the plaintiff in error.

III.

But the second point upon which the decision rests is unquestionably a non-federal ground, and affords no right to a writ of error from this court. The second point made by the defendant in error in the Supreme Court of Missouri was that, under the undisputed evidence, if the defendant was liable at all, it was for a breach of contract, and not for a conversion of the goods. The Supreme Court of Missouri sustained this point, which would support the judgment of reversal without regard to the first point made by the defendant in error. The opinion upon this second point is as follows:

> "II. Regarding the second reason assigned by defendant for a reversal of the judgment, namely, that if it is liable at all to the plaintiff, it is not for a conversion of the liquor shipped, but for damages for a breach of the C. O. D. contract as before defined, for nondelivery of the liquors and not collecting the purchase price thereof, as therein provided. If we are correct in holding in paragraph 1 of this opinion that the C. O. D. contract mentioned was separate and independent of the defendant's duty as a common carrier to transport and deliver the packages within a reasonable time, then clearly, under the undisputed evidence that the defendant still has the packages and offers to return them to the plaintiff upon the payment of the express charges from Texas to Kansas City, there could be no conversion.
>
> These facts do not constitute a conversion of the liquors, but a breach of the C. O. D. contract, which took effect after the defendant's duty to the plaintiff as a common carrier had terminated."

It will thus be seen that it is clear from the foregoing opinion that the judgment of reversal of the Supreme Court of the State of Missouri rested upon one ground which was a non-federal ground, and was broad enough to sustain the judgment. If the plaintiff brought the wrong kind of an action, which the Supreme Court of Missouri held he had, this did not raise any federal question whatever. The decisions of this court are clear that, if the judgment rested on a non-federal ground broad enough to sustain it, this court has no jurisdiction to issue a writ of error to review such judgment.

Kansas City Star Co. v. *Henry S. Julian*, 215 U. S. 589, 30 Sup. Ct. Rep. 406.
Cincinnati Street Ry. Co. v. *Snell*, 193 U. S. 30, 24 Sup. Ct. Rep. 319.
Hammond Packing Co. v. *Arkansas*, 212 U. S. 322, 29 Sup. Ct. Rep. 370.
Powell v. *Supervisors of Brunswick County*, 150 U. S. 433, 14 Sup. Ct. Rep. 168.
Sayward v. *Denny*, 158 U. S. 180, 15 Sup. Ct. Rep. 777.
Axley Stave Co. v. *Butler County*, 17 Sup. Ct. Rep. 709.

We therefore submit that the writ of error should be dismissed for want of jurisdiction in this court to issue the same.

Respectfully submitted,

J. L. MINNIS,
I. N. WATSON,
Counsel for Defendant in Error.

No. 249

In the

Supreme Court of the United States

ABRAM ROSENBERGER, *Plaintiff in Error,*

vs.

PACIFIC EXPRESS COMPANY, *Defendant in Error.*

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR.

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In the

Supreme Court of the United States

ABRAM ROSENBERGER, *Plaintiff in Error,*

vs.

PACIFIC EXPRESS COMPANY, *Defendant in Error.*

No. 626.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR.

The Supreme Court of Missouri stated the facts in this case as follows:

> "This is a suit in conversion.
>
> "The facts of this case are undisputed and are briefly as follows:
>
> "The plaintiff, at all the times hereinafter mentioned, was a wholesale liquor dealer in Kansas City, Missouri, transacting business in the ordinary manner throughout the United

States; and the defendant, the Pacific Express Company, a common carrier, was during said times engaged in carrying express matters throughout the United States, and especially from the state of Missouri to the state of Texas. That shortly prior to February 12, 1907, the plaintiff delivered to the defendant, express prepaid, certain packages of liquor to be transported by it to the former's customers in the state of Texas; the delivery thereof to be made on the payment of the price thereof, as will be presently stated.

"On said February 12, 1907, the state of Texas duly enacted a statute imposing an occupation tax on all persons and corporations 'handling liquors C. O. D.' The license or tax imposed by the statute was $5,000 a year at each place maintained for that purpose.

"That after the acceptance of said liquors by the defendant and prior to their delivery, said statute went into effect, and the defendant refused to deliver the packages or to collect the price thereof, and after due notice returned the same to the plaintiff at Kansas City, where they offered to deliver them to the plaintiff, upon condition that he pay the return express charges thereon. The plaintiff refused to pay said charges, and to accept said goods, and the defendant now holds the same, as it claims, for the use of the plaintiff.

"The plaintiff instituted this suit in the Circuit Court of Jackson County against the defendant for converting said goods to its own use.

"The terms and conditions of the contract of carriage and delivery to be subsequently mentioned, made and entered into by and between the plaintiff and defendant, were in writing, and expressed in a receipt given to the former

by the latter upon the receipt of the goods for shipment.

"This receipt is the ordinary one given by express companies to the consignor of goods; and paragraph 6 thereof, the one relating to the C. O. D. question involved in this case, reads as follows:

" 'If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the above described property and the same is not paid for or if in any case the consignee cannot be found, or for any other reason it cannot be delivered, the shipper agrees that this company may return said property to him subject to the conditions of this receipt, and that he will pay all charges for transportation,' etc.

"By paragraph 3 of the same contract it is also provided that:

" 'Defendant shall not be liable for any loss or damages by act of God, or of the enemies of government, or by the restraint of government,' etc.

"That after the taking effect of the Texas statute the defendant notified the plaintiff that if he would release the C. O. D. contract it would deliver the goods to the consignee; this the plaintiff refused to do, but insisted on the defendant carrying out its contract of shipment and delivery, and that it deliver the packages to the consignee and collect the C. O. D. charges which it refused to do; but upon the contrary ordered its agent to return the liquor to Kansas City, and charged the return express charges to the plaintiff, as previously stated."

The Missouri Supreme Court held (Judges Bond and Faris dissenting) that when the defendant under-

took to carry each of the shipments in question it assumed two separate obligations, the common law obligation to carry the goods in question, and the contractual obligation to collect the charges on the same; that the transportation part of the transaction was protected by the commerce clause of the Federal Constitution; that the collecting part was not so protected; and therefore the Texas statute did not violate the interstate commerce provisions of the Federal Constitution (Sec. 8, Art. 1).

The language of Judge Woodson is as follows:

> "Believing as I do that said statute does not in any manner operate in restraint of interstate commerce, I am clearly of the opinion that the same is a valid enactment, as was held by the Texas Civil Court of Appeals in the case of *Craddock* v. *Wells Fargo Express Co., supra.*"

In reaching its conclusion the Supreme Court of Missouri adopted the line of reasoning which was followed by the state courts in *Iowa* v. *American Express Co.*, 118 Iowa 447 (overruled in *American Express Co.* v. *Iowa*, 196 U. S. 133), and in *Kentucky* v. *Adams Express Co.*, 124 Ky. 182 (overruled in *Adams Express Co.* v. *Kentucky*, 206 U. S. 129). This Court has uniformly held that a C. O. D. interstate shipment was an integral transaction and protected in all its parts by the commerce clause of the Constitution.

The point is well illustrated in *American Express Co.* v. *Iowa*, 196 U. S. 133 (*supra*). In its opinion in that case the Supreme Court of Iowa had said:

> "In accepting the goods and attempting to collect the purchase price, the company was not

acting as a carrier, simply, but was undertaking the performance of an act prohibited by our law. If the act of the carrier in assuming to collect the purchase price be considered as a sale of the goods, or if it be found that such transaction on its part is not freed from the operation of our laws, by reason of being but a lawful step incident to interstate commerce, then the liquors should have been condemned. * * * In assuming to collect the purchase price and to hold possession until the price was paid, it (the express company) was in no proper sense engaged in interstate commerce."

But Chief Justice White, then Mr. Justice White, delivering the opinion of this Court, said, in part:

"And, as, in order to decide the contention that the judgment below rests upon an adequate non-Federal ground, we must necessarily consider how far the C. O. D. shipment was protected by the commerce clause of the Constitution, which is the question on the merits, we pass from the motion to dismiss to the consideration of the rights asserted under the commerce clause of the Constitution."

Similar holdings were made in cases involving C. O. D. shipments, in *Adams Express Co.* v. *Kentucky*, 206 U. S. 129 (*supra*), and in *Norfolk, etc., Rld. Co.* v. *Sims*, 191 U. S. 441 (48 L. Ed. 258):

Having reached the conclusion that the Texas statute was valid, and therefore constituted a legal excuse for failing to deliver the goods in question, the court then said, in paragraph II of its opinion:

"If we are correct in holding in paragraph I of this opinion that the C. O. D. contract men-

> tioned was separate and independent of the defendant's duty as a common carrier to transport and deliver the packages within a reasonable time, then clearly, under the undisputed evidence that the defendant still has the packages and offers to return them to the plaintiff upon the payment of the express charges from Texas to Kansas City, there could be no conversion."

The Missouri Supreme Court did not hold that even if the Texas state statute was invalid the defendant was not guilty of conversion. The language of the opinion refutes any such contention, and there is no room for assuming that the court would have made such a ruling in the face of rules of law recognized as elementary by text-writers and the Missouri courts. Under the principle illustrated in *Bowman* v. *Chicago, etc., Ry. Co.*, 125 U. S. 507 (31 L. Ed. 715), and *Louisville, etc., Co.* v. *Cook, etc., Co.*, 223 U. S. 70 (56 L. Ed. 355), the Texas statute, if invalid, constituted no excuse for the failure to deliver the goods in controversy. Therefore the refusal of the defendant to deliver them, and its return of them to Kansas City, over plaintiff's objection, and its refusal to deliver them to plaintiff at Kansas City except on condition that plaintiff pay the return charges, constituted a conversion of said goods by defendant. (2 Hutchinson on Carriers, 3d Ed., Sec. 727; 2 Cooley on Torts, 3d Ed. 868-869; 6 Cyc. 474; *Marshall, etc., Co.* v. *Kansas City, etc., Ry. Co.*, 176 Mo. 480, 491; *Danciger Bros.* v. *American Express Co.*, 172 Mo. App. 391.)

It is clear, therefore, that the decision of the Missouri Supreme Court was based entirely on its

conclusion that the Texas statute did not violate the commerce provision of the Federal Constitution.

Having found that there was no conversion, for the reason that the Texas statute was valid, the judgment of the trial court was reversed outright, without a remanding of the cause. Under the Missouri practice this was a final decision of the case against the plaintiff and deprived the plaintiff of any opportunity to further prosecute said action. (*Strottman* v. *St. Louis, etc., Co.*, 228 Mo. 154.)

The decision of the Supreme Court of Missouri having been based on its holding that the Texas statute did not invade rights conferred upon the plaintiff by the Federal Constitution, a Federal question which is paramount and controlling is directly involved in this case, and the motion to dismiss the writ of error is not well taken.

Respectfully submitted,

Frank A. Boys

Of Counsel on Brief.

Dec. 7th, 1914.

No. 249.

In the

Supreme Court of the United States

October Term, 1915.

ABRAM ROSENBERGER, *Plaintiff in Error,*

vs.

PACIFIC EXPRESS COMPANY, *Defendant in Error.*

In Error to the Supreme Court of the State of Missouri.

STATEMENT, ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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In the

Supreme Court of the United States

October Term, 1915.

ABRAM ROSENBERGER, *Plaintiff in Error,*

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PACIFIC EXPRESS COMPANY, *Defendant in Error.*

In Error to the Supreme Court of the State of Missouri.

STATEMENT, ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

No. 249.

STATEMENT.

Prior to February 12, 1907, plaintiff in error, hereinafter called the plaintiff, received in Kansas City, Missouri, *bona fide* orders from purchasers

in Texas for liquor to be sent to Texas C. O. D. in original packages. (Transcript of Record, p. 15.)

These orders were accepted by plaintiff in Kansas City, and plaintiff, pursuant thereto and prior to February 12, 1907, delivered the packages of liquor in controversy to the defendant in error, hereinafter called the defendant, to be transported to customers in Texas, the delivery of each package to be made on payment by the customer of the price thereof, and the defendant accepted these packages and undertook the performance of their shipment and delivery, and the collection of the price therefor. (Transcript of Record, pp. 14, 15.)

On February 12, 1907 (Transcript of Record, pp. 23, 24), the state of Texas enacted a statute imposing or attempting to impose an occupation tax on persons, firms or corporations handling liquors C. O. D., the tax being $5,000 a year on each office maintained, said statute being as follows:

> "TAXES—IMPOSING OCCUPATION TAX ON PERSONS, FIRMS OR CORPORATIONS HANDLING LIQUORS C. O. D.
>
> H. B. No. 53. Chapter IV.
>
> An Act imposing an annual occupation tax upon each office or place kept and maintained by any person, firm or corporation in this state at which intoxicating liquors legally deliverable are delivered upon payment of purchase money therefor, providing a penalty for failure to pay such tax, and declaring an emergency.
>
> SECTION 1. Be it enacted by the Legislature of the State of Texas: Any person, firm or corporation doing business in this state

shall, at each office or place kept, operated or maintained by such person, firm or corporation at which intoxicating liquors legally deliverable are delivered upon payment of purchase money therefor commonly designated as shipments C. O. D., pay annually for each office or place so kept an annual occupation tax to the state of Texas of five thousand dollars, and any county or any incorporated city or town wherein such office or place is located, may levy an annual occupation tax upon such person, firm or corporation herein referred to for each of said offices not to exceed one-half of the amount hereby levied by the state, such tax to be due and payable annually.

SEC. 2. The maintaining or operating such office or offices, place or places by any person, firm or corporation in this state without paying the occupation tax required in section one of this Act shall subject such person, firm or corporation so operating and maintaining such office or offices, place or places, to pay to the state of Texas the sum of fifty dollars, and to the county and any incorporated city or town in which said offices or places are located, each the sum of fifty dollars for each day such office or offices, place or places may be maintained or operated for each office or place so operated; and the state or county or any incorporated city or town may sue for and recover either jointly or severally, each the said sum, for each day that each of said offices or places may be maintained and operated without prepayment of the aforesaid occupation tax.

SEC. 3. The fact that persons, firms and corporations are doing an extensive business in shipping and delivering intoxicating liquors in this state at their various offices or places

on the payment of the purchase money therefor and are paying no occupation tax for such privilege, creates an emergency and an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days in each house, and that this Act take effect from and after its passage, and it is so enacted.

(Note—The enrolled bill shows that the foregoing Act passed the House of Representatives by the following vote, yeas 104, nays 3; was referred to the Senate, amended and passed by the following vote, yeas 29, nays 0; the House concurred in Senate amendments by the following vote, yeas 94, nays 4.)

Approved February 12, 1907.

Became a law February 12, 1907."

On the passage of this Act the defendant refused to make deliveries of the goods theretofore received by it (Transcript of Record, p. 15), or to make any collections on account thereof, and returned the goods to Kansas City, where it offered to deliver them to the plaintiff only on condition that plaintiff pay the full return charges thereon. The plaintiff refused to accede to this demand, the defendant retained the goods (Transcript of Record, pp. 20, 21), and plaintiff sued the defendant for conversion, in this action, in the Circuit Court of Jackson County, Missouri, where the plaintiff recovered judgment against the defendant. The defendant appealed to the Supreme Court of Missouri, where the judgment of the Circuit Court was reversed, without remanding, said Supreme Court of Missouri hold-

ing that the Texas statute above referred to was valid, and justified defendant in refusing to deliver the goods in controversy, and therefore the plaintiff was not entitled to recover. Under the Missouri practice this was a final decision of the case and deprived the plaintiff of any opportunity to further prosecute this action. (*Strottman v. St. Louis, etc., Co.*, 228 Mo. 154.) Plaintiff in error, in the trial court and in the Supreme Court of Missouri, attacked the validity of the Texas statute as being in contravention of Sections 8 and 10 of Article 1 of the Constitution of the United States (Transcript of Record, pp. 24, 30, 34), and contended that it was therefore no excuse for the refusal of defendant to deliver said goods. Plaintiff's contention being denied by the Supreme Court of Missouri, a writ of error was sued out in this Court, and in due time the record was filed in this Court.

ASSIGNMENTS OF ERROR.

Plaintiff in error makes the following assignments of error in this Court, and because of such errors prays for a reversal of the judgment of the Supreme Court of the State of Missouri (Transcript of Record, pp. 2, 3):

The Supreme Court of Missouri erred in holding and deciding:

1. That said statute of Texas of February 12, 1907, was a valid enactment of the Legislature of said state, insofar as it affected, applied to or controlled interstate C. O. D. shipments of original packages of liquor shipped from the state of Missouri to the state of Texas, and was not repugnant to or in contravention of either Section 8 or Section 10 of Article I of the Constitution of the United States.

2. That said Act of the state of Texas of February 12, 1907, was a valid police regulation of the state of Texas and was not repugnant to or in contravention of either Section 8 or Section 10 of Article I of the Constitution of the United States and was, therefore, a legal excuse for the refusal of respondent Pacific Express Company to comply with its obligations and undertakings to and with respondent Abram Rosenberger to carry from Missouri and deliver in Texas original packages of liquor and collect the cost price thereof on delivery, the said appellant Pacific Express Company having received such packages from respondent Abram Rosenberger in Missouri

and having agreed in Missouri to carry them from the state of Missouri to the state of Texas and to deliver the same, in Texas, to the consignees thereof (who had purchased the same in Missouri) on the payment of the purchase price thereof by such consignees; such obligations and undertakings having been assumed by appellant Pacific Express Company prior to the passage of such Texas statute.

3. That the trial court properly admitted in evidence the said statute of the state of Texas of February 12, 1907, and did not err in overruling the objection of respondent that said statute was in contravention of Section 8 of Article I of the Constitution of the United States.

4. In not holding that said statute of Texas of February 12, 1907, is an unwarranted attempt to regulate interstate commerce and is violative of Section 8 of Article I of the Constitution of the United States.

5. In reversing the judgment in favor of respondent, whereby the erroneous rulings aforesaid were made.

BRIEF AND ARGUMENT.

I.

Liquor is an article of commerce and is entitled to the same protection under the commerce clause of the Federal Constitution as any other commodity in the absence of an Act of Congress to the contrary. The Wilson Act of August, 1890, which was the only Federal law at the time the cause of action in question arose tending to regulate interstate commerce in liquor, goes no farther than to subject an interstate shipment of liquor to state regulation after it has been delivered to the consignee and while still in the original package. The effect of this Act was merely to do away with the original package doctrine and the rights incident thereto.

(a) Liquor is an article of commerce.

In *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128 (decided April 28, 1890), the court said:

> "Ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which the right of traffic exists and are so recognized by the usages of the commercial world."

In Re Rahrer, 140 U. S. 545, 35 L. Ed. 572 (decided May 25, 1891), the court said:

> "Unquestionably fermented, distilled or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic between nation and nation and between state and state, like any other

commodity in which the right of traffic exists and recognized as such by the usages of the commercial world, the laws of Congress and the decisions of courts."

In *Louisville & N. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355 (decided January 22, 1912), Mr. Justice Lurton, delivering the opinion of the court, said:

"By a long line of decisions, beginning even prior to *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, it has been indisputably determined:

(a) That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;

(b) That it is not competent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another;

(c) That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition."

(b) The Wilson Act.

In *Rhodes v. State of Iowa*, 170 U. S. 412, 42 L. Ed. 1088, 1096 (decided May 9, 1898), in construing the Wilson Act, Mr. Justice White, delivering the opinion of the majority of the court, said:

"We think that, interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of

> the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

This case, though decided by a divided court, has been followed by every subsequent case involving the same point and has not been limited or criticised.

In *Louisville & N. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355 (decided January 22, 1912), Mr. Justice Lurton, delivering the opinion of the court, said:

> "The Wilson Act (26 Stat. at L. 313, Chap. 728, U. S. Comp. Stat. 1901, p. 3177), which subjects such liquors to state regulation, although still in the original packages, does not apply before actual delivery to such consignee, where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson Act construed are: *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. Rep. 664; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. Rep. 674; *Heymann* v. *Southern R. Co.*, 203 U. S. 270, 51 L. Ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130; *Adams Exp. Co.* v. *Kentucky*, 214 U. S. 218, 53 L. Ed. 972, 29 Sup. Ct. Rep. 633."

II.

The Texas occupation tax statute of February 12, 1907, was no defense for defendant's failure to perform its contracts of shipment and collection because, if applicable to the shipments in controversy, the Act was an attempted state regulation of interstate commerce and therefore unconstitutional.

(a) The contracts whereby the defendant undertook to carry the liquor in question from Kansas City, Missouri, to various points in the state of Texas and to collect the purchase price thereof from the consignees were in reference to and formed an integral part of interstate commerce transactions, and the state of Texas was without legal power to impose burdens on or to prevent the performance of such contracts.

The commerce clause of the Federal Constitution vests in Congress the exclusive right to regulate interstate commerce and the failure of Congress to enact a law on the subject of C. O. D. liquor shipments did not give Texas authority to enact such a law involving interstate commerce.

Judge Taney, in *Peirce* v. *New Hampshire*, 5 How. 506, first held that the state in the absence of congressional enactment had the authority to enact laws involving interstate commerce, but this doctrine was changed by *Bowman* v. *C. & N. W. Ry.*, 125 U. S. 507 (31 L. Ed. 715), which is quoted in *Leisy* v. *Hardin*, 135 U. S. 100 (34 L. Ed. 128), which states, on page 136 of the last cited edition, the following:

> "But, where the subject is national in its character, and admits and requires uniform-

ity of regulation, affecting alike all of the states, such as transportation between the states, including the importation of goods from one state into another, Congress alone can act upon it and provide the needed regulations. *The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.* Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted."

In Re Rahrer, 140 U. S. 545 (decided May 25, 1891), Chief Justice Fuller said:

"The power of Congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states."

In *Welton* v. *Missouri*, 91 U. S. 275 (23 L. Ed. 347, 350), Justice Field said:

"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question.

> Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

The principle of constitutional law expounded in the foregoing cases has been so held by this Court to prevent the several states from prohibiting or imposing burdens on the performance of interstate C. O. D. contracts.

In *Adams Express Co.* v. *Kentucky*, 206 U. S. 129, 51 L. Ed. 987 (decided May 13, 1907), the express company having transported a gallon of whisky from Ohio into Kentucky under a C. O. D. contract and having collected the purchase price thereof from the consignee, was indicted and convicted for selling whisky in violation of the following Kentucky statute:

> "All the shipments of spirituous, vinous, or malt liquors, to be paid for on delivery, commonly called 'C. O. D. shipments,' into any county, city, town, district, or precinct where said Act is in force, shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The case was ultimately appealed to this Court on the ground that the statute under which defendant was convicted was in conflict with the commerce clause of the Federal Constitution. Mr.

Justice Brewer, delivering the opinion of the Court, said:

> "The testimony showed that the package, containing a gallon of whisky, was shipped from Cincinnati, Ohio, to George Meece, at East Bernstadt, Kentucky. The transaction was therefore one of interstate commerce, and within the exclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such interstate commerce. This is hardly questioned by the court of appeals, and is beyond dispute under the decisions of this court.
>
> In *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 444, 42 L. Ed. 1100, 1103, 18 Sup. Ct. Rep. 674, 676, Mr. Justice White, delivering the opinion of the court, said:
>
> 'Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.'
>
> In *Rhodes* v. *Iowa*, 170 U. S. 412, 426, 42 L. Ed. 1088, 18 Sup. Ct. Rep. 664, 669, it was held that the Wilson Act (26 Stat. at L. 313, Chap. 728, U. S. Comp. Stat. 1901, p. 3177), 'was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of

destination and delivery there to the consignee.'"

* * * * *

In its opinion the Court of Appeals, in 124 Ky. 182, had said:

"Express companies do not more surely deliver goods entrusted to them than do ordinary freight trains, but they undertake a quicker delivery, and by reason of such undertaking, are permitted to charge and are paid more than are railroad companies. A failure, therefore, upon their part to immediately—that is, in a reasonable and customary time—deliver goods shipped in their charge, or their holding of such goods an unreasonable or unusual time, changes their relations at once from a common carrier to that of an ordinary warehouseman. In view of this rule, and under the facts of the case at bar, we must conclude that at the time of delivering to Meece the whisky in question, and in receiving the price paid by the latter therefor appellant did not sustain to that article of merchandise, or to the consignor or consignee, the relation of common carrier, but merely that of a bailee or warehouseman, for which reason we are unable to see how it was or could have been protected in the transaction by the law of interstate commerce."

In repudiating this theory Mr. Justice Brewer said:

"The (Kentucky) court held that, by reason of the retention of the package by the agent, the company ceased to hold it as carrier, and had become a mere bailee or

warehouseman; that, therefore, the statute, as applied to the transaction, was not a regulation of commerce. * * * That the agent consented to hold the whisky until Saturday did not destroy the character of the transaction as one of interstate commerce is settled by the recent case of *Heymann* v. *Southern Railway Company*, 203 U. S. 270."

* * * * *

"Much as we may sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a state, we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce.

The judgment of the Court of Appeals of Kentucky is reversed and the case remanded for further proceedings not inconsistent with this opinion."

This case has not been limited, criticised or overruled.

In *American Express Co.* v. *Iowa*, 196 U. S. 133, 49 L. Ed. 417 (decided January 3, 1905), Mr. Justice White tersely stated the facts as follows:

"The American Express Company received at Rock Island, Illinois, on or about March 29, 1900, four boxes of merchandise to be carried to Tama, Iowa, to be there delivered to four different persons, one of the packages being consigned to each. The shipment was C. O. D., $3 to be collected on each package, exclusive of 35 cents for carriage of each. On March 31st the merchandise reached Tama, and on that day was seized

in the hands of the express agent. This was based on an information before a justice of the peace, charging that the packages contained intoxicating liquor held by the express company for sale. The express company and its agent answered, setting up the receipt of the packages in Illinois, not for sale in Iowa, but for carriage and delivery to the consignees. An agreed statement of facts was stipulated admitting the receipt, the carriage, and the holding of the packages as above stated. The seizure was sustained. Appeal was taken to a District Court. The express company and its agent amended their answer, specially setting up the commerce clause of the Constitution of the United States. There was judgment in favor of the express company, and the state of Iowa appealed to the Supreme Court and obtained a reversal. 118 Iowa 447, 92 N. W. 66. This writ of error was prosecuted."

The Supreme Court of Iowa had stated its position in the following language:

"In accepting the goods and attempting to collect the purchase price, the company was not acting as a carrier, simply, but was undertaking the performance of an act prohibited by our law. If the act of the carrier in assuming to collect the purchase price be considered as a sale of the goods, or if it be found that such transaction on its part is not freed from the operation of our laws, by reason of being but a lawful step incident to interstate commerce, then the liquors should have been condemned. * * * In assuming to collect the purchase price and to hold possession until the price was paid, it (the

express company) was in no proper sense engaged in interstate commerce."

But Mr. Justice White, delivering the opinion of the court, said:

"And, as, in order to decide the contention that the judgment below rests upon an adequate non-Federal ground, we must necessarily consider how far the C. O. D. shipment was protected by the commerce clause of the Constitution, which is the question on the merits, we pass from the motion to dismiss to the consideration of the rights asserted under the commerce clause of the Constitution."

After reviewing *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. Ed. 70; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128; *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. Ed. 1088, and *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 442, 42 L. Ed. 1100, 1102, the court continued:

"Coming to test the ruling of the court below by the settled construction of the commerce clause of the Constitution, expounded in the cases just reviewed, the error of its conclusion is manifest. Those cases rested upon the broad principle of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of the citizen of a state to contract to send merchandise into other states. *They rested also upon the obvious want of power of one state to destroy*

contracts concerning interstate commerce, valid in the states where made."

* * * * * *

"Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and, in doing so, to fix by agreement the time when and condition on which the completed title should pass, is beyond question. The shipment from the state of Illinois into the state of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another state so as to invalidate a lawful contract as to interstate commerce made in such other state."

* * * * * *

"When it is considered that the necessary result of the ruling below was to hold that, wherever merchandise shipped from one state to another state is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the great purpose of the Constitution to promote. *If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizen of one state from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the state where made, to the laws of another state; and it would remove*

> *from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied.* Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof.
>
> But the general considerations need not be further adverted to in view of prior decisions of this court relating to the identical question here presented."

The court then cited and quoted from *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336, and *Norfolk & W. R. Co.* v. *Sims*, 191 U. S. 441, 48 L. Ed. 254, recognized them to control the question under consideration and reversed the judgment of the Supreme Court of Iowa because it did not apply the commerce clause of the Federal Constitution to protect C. O. D. shipments.

In *Norfolk & W. R. Co.* v. *Sims*, 191 U. S. 441, 48 L. Ed. 254 (decided December 7, 1903), a resident of North Carolina mailed an order to Sears, Roebuck & Company at Chicago for a sewing machine which was accepted and the machine was shipped C. O. D. The consignee paid the amount of the purchase price, but before the machine was delivered by the carrier

it was levied upon by the sheriff on the ground that Sears, Roebuck & Company owed the state of North Carolina a license fee of $350 under the following statute:

> "Every manufacturer of sewing machines, and every person or persons or corporation engaged in the business of selling the same in this state, shall, before selling or offering for sale any such machine, pay to the state treasurer a tax of $350 and obtain a license, which shall operate for one year from the date of the issue."

The Supreme Court of North Carolina held that this statute did not conflict with the commerce clause of the Federal Constitution and the case was before this Court on writ of error.

Speaking of the C. O. D. shipment the Supreme Court of North Carolina had said (*Sims* v. *R. R.*, 130 N. C., l. c. 557):

> "Thus the title could not pass till such payment was made to the common carrier, acting as the agent of the shipper. This was an executory contract in Illinois, but there was no sale till the payment was made and thus the sale was executed in North Carolina and the shippers are liable to the above tax. * * *
>
> The well-known case of *O'Neal* v. *Vermont*, 144 U. S. 324, is decisive of that point. There, in the shipment of liquor from New York into Vermont C. O. D., it was held that the completed executory contract was in New York, but the completed sale was in Vermont, as here."

Mr. Justice Brown, in delivering the opinion of this Court, said:

> "Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another state, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the state. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, *and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce.*
>
> The judgment of the Supreme Court of North Carolina is therefore reversed and the case remanded to that court for further proceedings not inconsistent with this opinion."

(Note: In *O'Neal* v. *Vermont*, this Court held a Federal question was not properly raised and *did not* pass upon the question as to the place of sale. The Vermont court had already decided that question.)

In *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336 (decided January 12, 1903), the defendant was tried for violating the following ordinance of Greensboro, North Carolina:

> "That every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the

> human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of $10 for each year.
>
> Any person engaging in said business without having paid the license tax required herein shall be fined $20 and each and every sale or delivery shall constitute a separate and distinct offense."

The defendant was the agent of a non-resident picture company and had delivered pictures and frames to persons who had ordered the same from the company at its office in Chicago, Illinois, where said orders were accepted.

The Supreme Court of North Carolina (127 N. C. 521), in sustaining the lower court, stated its position in reference to the interstate commerce question in the following language:

> "If they had been completed in Chicago, and under contracts shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago, the railroad being deemed the agent of the consignee. * * * But, instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to itself (the Chicago Portrait Company) at Greensboro. This being so, no title ever passed from the Chicago Portrait Company until the pictures were put in the frames and delivered by the defendant. * * * We are therefore of the opinion

> that * * * defendant was engaged in the business of selling and delivering picture frames in the city of Greensboro; and as we are not able to see how the enforcement of this ordinance interferes with interstate commerce the judgment of the court below is affirmed."

The case was before this Court on writ of error on the ground that the ordinance in question violated the commerce clause of the Federal Constitution. The United States Supreme Court, in reversing the North Carolina court, speaking through Mr. Justice Shiras, said:

> "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. *It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation.* The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate."

See also *Rossi* v. *Pennsylvania*, 238 U. S. 62.

(b) Liquor shipped from one state, where the order is accepted, to another state, C. O. D., is a sale made in the state from which the goods are shipped and not the state in which goods are received.

This law is now definitely settled by numerous cases.

American Express Co. v. *Iowa*, 196 U. S. 133.
Norfolk & W. R. R. v. *Sims*, 191 U. S. 441.

This same rule has been held to apply when the shipment is made from one county of a state to another county of the same state.

State v. *Rosenberger*, 212 Mo. 648.

In this case Judge Burgess, overruling his own *dicta* previously announced by him in *State* v. *Wingfield*, 115 Mo. 437, says, among other things, on page 657, the following:

> "The great mercantile interests of the country seem to demand that the law by which such interests are governed should be uniform, and we are of opinion that, so far as concerns the title to goods delivered to a carrier for shipment, the same rule applies to C. O. D. shipments as to those in ordinary cases, in the absence of any express contract to the contrary between the shipper and the consignee."

(c) The transactions in the instant case occurred in February, 1907. Thereafter, on March 4th, 1909, Congress adopted a new penal code (35 Stat. L. 1136, Fed. Stat. Ann. Supp. 1909, p. 473) making C. O. D. liquor shipments by railroad companies, express companies or common carriers between states unlawful. A decision by this Court that the Texas statutes can regulate interstate C. O. D. shipments must mean that Congress has attempted to exercise a power it does not possess.

The statute passed by Congress March 4, 1909, is as follows:

> "Sec. 239. (Common carriers, etc., not to collect purchase price of interstate shipment of intoxicating liquors.) Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars. (35 Stat. L. 1136.)"

(d) C. O. D. Contracts for the shipment of liquors from one state to another pursuant to bona fide orders accepted in the state where the liquor is delivered to the carrier are within the protection of the commerce clause of the Federal Constitution independently of whether such contracts are imposed on a carrier as a common law duty or are voluntarily assumed.

Whether C. O. D. contracts are protected by the commerce clause of the Federal Constitution is a question of constitutional law; whether such contracts must be assumed by a carrier involves a question of the common law or statutory duty of a common carrier. These two questions are determined by entirely different considerations and principles of law.

The commerce clause was made a part of the Federal Constitution because its framers desired that commercial intercourse between the citizens of the several states should be free from and untrammeled by local regulations and burdens, while the common law duties of a carrier arose from the public nature of its calling long before the Federal Constitution was adopted.

This Court in the cases hereinbefore cited recognized this class of contracts to be free from state regulation.

In *Heymann* v. *Southern Ry. Co.*, 203 U. S. 270, 51 L. Ed. 178, Mr. Justice White, delivering the opinion of the court, said:

> "As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled

> rule is that the Wilson Law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery, and before sale, we are not concerned with whether, under the law of any particular state, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination, before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several states concerning the precise time when the liability of a carrier, as such, in respect to the carriage of goods, ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority."

The views herein advanced are further fortified by those cases which hold that collect-on-delivery contracts are exempt from state regulation where the collecting agent was not a carrier at all.

Dozier v. *Alabama*, 218 U. S. 124, 54 L. Ed. 965.

Caldwell v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336.

In *Dozier* v. *Alabama, supra*, the plaintiff in error was convicted for selling picture frames in violation of an Alabama statute which imposed

a license tax on persons who did not have a permanent place of business in the state and also kept picture frames as part of their stock in trade if they solicited orders for photographs or pictures of any character or for picture frames whether they made charge for same or not, or if they sold or disposed of frames. The Chicago Crayon Company solicited orders in Alabama without paying the license tax.

> "These orders were given in writing for a portrait of the size and kind wanted, specified the price, cash on delivery, and continued: 'I understand that my portrait is to be delivered in an appropriate frame, which this contract entitles me to accept at factory price.'"

These orders were duly accepted. The plaintiff in error, who had paid no license tax, was an agent of the company who handled pictures and frames and collected for them in pursuance of the agreed plan. The pictures and frames were sent to the agent and remained the property of the company until paid for and delivered. Mr. Justice Holmes, delivering the opinion of the court, said:

> "What is commerce among the states is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed. It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered 'at factory prices,' and the com-

> pany and factory were in Chicago, obviously it was contemplated, if not agreed, that the frame should come on with the picture. In fact, the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous, and one at prices generically fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. We are of the opinion that the sale of the frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it. Under the decisions, the statute, as applied to this case, is a regulation of commerce among the states, and void under the Constitution of the United States."

That the decision in the instant case is not based on a difference in fact, but on a difference between the views of this Court and the views of the writer of the opinion in this case in the Supreme Court of Missouri is shown by his concurring opinion in *Kansas City* v. *McDonald*, — Mo. —, 175 S. W. 917, 920, wherein he disapproves of the reasoning of this Court in the Dozier case.

It is submitted that the foregoing cases conclusively establish the fact that the nature of the obligation of the medium which undertakes to perform a C. O. D. contract has nothing to do with whether such a contract is free from state regulation. Whoever assumes to deliver and collect is merely an instrumentality employed in

the carrying out of an interstate commerce transaction, and while so employed is within the protection of the commerce clause of the Federal Constitution. The language of Mr. Justice Shiras in *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336, is apt:

> "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate."

(e) The Texas Act being unconstitutional in so far as it applied to interstate commerce afforded the defendant no excuse for its failure to perform its contracts to ship and collect.

> "A void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain his claim

through them, fails in his defense and in his claim of exemption from suit."

Hopkins v. *Agricultural College*, 221 U. S. 636, 644, 55 L. Ed. 890, 895.

"An unconstitutional act is no law at all."

Williams v. *Railroad*, 233 Mo. 666, 681.

In *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355, the railroad company was enjoined from refusing to accept beer for transportation from Evansville, Indiana, to local option points in Kentucky. The railroad company had refused such shipments because they were in violation of the local option statutes of the state of Kentucky. This Court, in holding such statute unconstitutional insofar as it affected interstate commerce, through Mr. Justice Lurton, said:

"Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment insofar as it undertook to regulate interstate shipments to dry points."

* * * * * *

"It is obvious, therefore, that insofar as the Kentucky statute was an illegal regulation of interstate commerce, it neither imposed an obligation to obey, nor affords an excuse for refusal to perform the general duty of the railroad company as a common carrier of freight."

In *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 564, 31 L. Ed. 700, the railroad company was sued for damages because it refused to receive liquor to be shipped from Illinois into Iowa. The defendant pleaded the Iowa prohibitory law as a defense. The plaintiff demurred to this plea on the ground that the Iowa statute was in conflict with the commerce clause of the Federal Constitution and therefore void. This Court held that the plaintiff's demurrer should have been sustained; that the Iowa statute insofar as it affected the interstate commerce transaction in question was unconstitutional and afforded defendants no excuse for their failure to receive and ship the plaintiff's liquor.

Conclusion.

According to the unbroken line of decisions of this court the Texas statute of Feb. 12, 1907, was an interference with interstate commerce, and therefore invalid as applied to the shipments in controversy, and constituted no excuse for defendant's failure to deliver the shipments in controversy. The judgment of the Supreme Court of Missouri should therefore be reversed.

Respectfully submitted,

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Kansas City, Mo., January 24, 1916.